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NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

FRANCIS NEWARK,

BARRISTER-AT-LAW

1955

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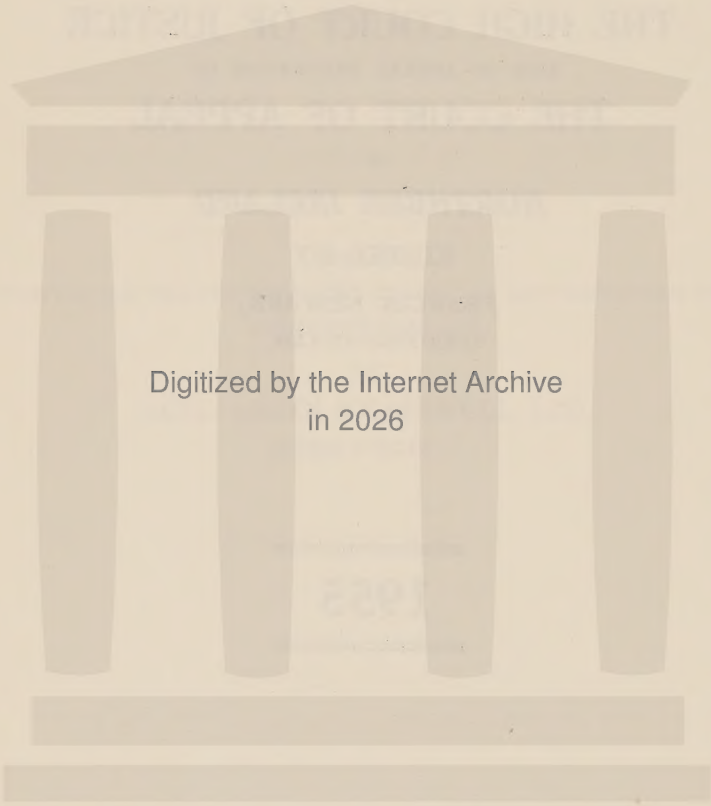

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Lords Justices of Appeal:

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THE RIGHT HON. ARTHUR BLACK.

Chancery Division:

THE HON. LANCELOT ERNEST CURRAN.

Queen's Bench Division:

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THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

ADDISON (OTHERWISE McALLISTER) v. ADDISON (1).

Nullity—Jurisdiction—Voidable marriage—Woman petitioner resident within the jurisdiction—Respondent resident and domiciled out of the jurisdiction—Marriage celebrated within the jurisdiction—Matrimonial Causes and Marriage Laws (Ireland) Act, 1870 (33 & 34 *Vict. c.* 110), *ss.* 7, 13—*Matrimonial Causes Act (Northern Ireland)*, 1938 (2 & 3 *Geo.* 6 *c.* 13), *ss.* 11, 28 (1)—*R.S.C. Or.* 70, *r.* 7 (1).

In 1943 a ceremony of marriage was celebrated in Northern Ireland between the petitioner who was domiciled and resident in Northern Ireland, and the respondent who was a serving soldier domiciled in England. In 1946 the respondent was demobilised and the parties went to live in England. After a few days they separated and the petitioner returned to Northern Ireland while the respondent continued to live in England. In 1952 the petitioner presented a petition to the High Court in Northern Ireland seeking the annulment of the marriage on the ground of the respondent's impotency, or alternatively on the ground of his wilful refusal to consummate the marriage. This petition was served on the respondent in England. A solicitor in England instructed by the respondent denied the allegations, stated that the case would not be defended if an arrangement could be reached on costs and requested the petitioner's solicitor to suggest solicitors in Northern Ireland who would act for the respondent. In fact no appearance was entered on behalf of the respondent and subsequent correspondence showed that

(1) In the Queen's Bench Division (Matrimonial) before Lord MacDermott L.C.J.: April 23, 30, Oct. 26, 27, 28, 29, 1954; Jan. 14, 1955.

the respondent did not intend to contest the suit but wished to have the marriage terminated. On the suit coming on for hearing as an undefended suit.

Held, (i) that the residence of the petitioner within the jurisdiction was not of itself sufficient to confer jurisdiction on the court.

The jurisdiction of the High Court in Northern Ireland in nullity matters depends on section 7 of the Matrimonial Causes and Marriage Laws (Ireland) Act, 1870, by which the court is to "proceed and act and give relief on principles and rules which in the "opinion of the said court shall be as nearly as may be conformable "to the principles and rules upon which the ecclesiastical courts "of Ireland have heretofore acted and given relief." These courts acted on principles analogous to the Statute of Citations, 1531, although that statute did not apply in Ireland, and the decisions of the civil courts do not support the proposition that these principles have been departed from to the extent of exercising jurisdiction on the basis that the petitioner alone resided within the jurisdiction.

De Reneville v. De Reneville [1948] P. 100 followed.

(ii) that the facts did not warrant the assumption that the respondent had submitted to the jurisdiction of the court.

Semble that in cases involving status jurisdiction cannot be conferred by the submission of a party to the jurisdiction of the court.

(iii) that the provisions of Order 70, r. 7 (1) that a petition in a matrimonial cause or matter may be served out of the jurisdiction without leave does not confer jurisdiction on the court to deal with a matter not otherwise cognisable.

(iv) that in the exercise of the jurisdiction to annul a marriage there is no ground for distinguishing between a void marriage and a voidable marriage, and as the courts of England and Ireland have long exercised jurisdiction to annul void marriages celebrated within the jurisdiction irrespective of the domicile or residence of the parties, there was power in the court to pronounce a decree of nullity in the present case on the ground that the marriage was celebrated in Northern Ireland.

Inverclyde v. Inverclyde [1931] P. 29 and *Casey v. Casey* [1949] P. 420 disapproved and not followed.

Semble, that in the present case the English court, as the court of the respondent's domicile, would have had concurrent jurisdiction.

PETITION by a woman for a decree of nullity on the ground of the impotency of the respondent, or alternatively on the ground of his wilful refusal to consummate the marriage.

The facts of the case sufficiently appear in the headnote to this case and in the judgment of the Lord Chief Justice.

At the hearing of the petition and after evidence had been received the Lord Chief Justice indicated that he was satisfied that the marriage had not been consummated by reason of the impotency of the respondent, but as he was not clear that the court had jurisdiction to pronounce the decree asked for he adjourned the case and directed that the papers be sent to the Chief Crown Solicitor pursuant to section 11 of the Matrimonial Causes Act (Northern Ireland), 1938, so that the Attorney-General might be represented at the adjourned hearing.

McGonigal for the petitioner.

Nicholson Q.C. and *Lowry* for the Attorney-General.

Cur. adv. vult.

Lord MacDermott L.C.J.: In this suit the petitioner asks that her marriage be decreed null and void on the ground of the respondent's incapacity or, alternatively, of his wilful refusal to consummate it.

The petitioner, who has lived in or near Coleraine, County Londonderry since she was a small child, met the respondent, an Englishman, during his Army service in Northern Ireland. They became engaged and the marriage ceremony took place on December 8, 1943, at Coleraine. The respondent was then stationed in England and he returned to duty there after a week's honeymoon, which was spent partly in Belfast and partly in Coleraine. Subsequent leaves were spent with the petitioner, generally at Coleraine. In the spring of 1946 the respondent was demobilised and the petitioner then went to live with him in England. This visit was not a success as it failed to resolve the difficulties which had by that time arisen between the parties concerning their marital relations. After four

days the petitioner returned to Coleraine. She has not seen the respondent since.

The petition avers that the respondent resides and is domiciled in England and that the petitioner resides in Coleraine and is domiciled in England. There is no doubt that until her marriage the petitioner's domicile was in Northern Ireland, but whether it then became that of the respondent is a matter which may ultimately be affected by the outcome of the present proceedings. Subject to this, however, I find these averments proved. The case, accordingly, is one in which (*a*) the marriage ceremony took place in Northern Ireland, (*b*) the respondent has at all material times been resident and domiciled in England, and (*c*) the petitioner has at all material times been resident in Northern Ireland and must, for the purposes of this suit, be regarded as domiciled in England.

After the respondent had been served with the petition a correspondence ensued between the solicitors for the parties to which I shall refer later. But, though this contained a denial of the charges made against him, the respondent did not enter an appearance and let the suit go undefended.

With regard to the grounds on which the petitioner seeks relief, it is unnecessary to enter upon the details of the evidence. Suffice it to say that having heard the testimony of the petitioner and of Professor C. H. G. Macafee, one of the medical inspectors, I am satisfied that there was no wilful refusal on the part of the respondent, but that, at the date of the ceremony and thereafter, he was incapable of consummating the marriage by reason of impotence.

As the findings stated obviously raised an important point of jurisdiction I adjourned the hearing and directed the necessary papers to be sent to the Chief Crown Solicitor under section 11 (1) of the Matrimonial Causes Act (Northern Ireland), 1939 (hereinafter referred to as the "Act of 1939"), with the result that upon the resumed hearing I had the assistance of counsel for the Attorney-General as well as counsel for the petitioner upon the question whether,

in the circumstances mentioned, there was jurisdiction to entertain the petition and annul the marriage.

This is, indeed, a vexed and difficult issue and I think it will be convenient if, in approaching it, I first of all say something about the source and general nature of this court's jurisdiction in nullity matters, and then proceed to consider the several submissions advanced on behalf of the petitioner in support of the contention that the findings are such as to enable me to grant the relief sought.

Unlike the jurisdiction in suits for dissolution which here, as in England, is wholly statutory in origin, the jurisdiction of this court in suits for nullity is mainly derived from the law and practice of the ecclesiastical courts in Ireland. The manner in which the matrimonial jurisdiction of those courts ultimately became vested in this court has been described by Andrews L.C.J. in *Mason v. Mason* (1), and I do not pause to trace the process through all its statutory steps. But it is important to refer to the first of these, the Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870. Section 7 of that Act transferred the jurisdiction of the ecclesiastical courts in Ireland in respect of (inter alia) suits of nullity of marriage to the Sovereign, and directed that it should be exercised in a court to be called the Court for Matrimonial Causes and Matters. Then, section 13 enacted as follows :—

> " In all suits and proceedings the said Court for " Matrimonial Causes and Matters shall proceed " and act and give relief on principles and rules " which, in the opinion of the said Court, shall be " as nearly as may be conformable to the principles " and rules on which the ecclesiastical courts of " Ireland have heretofore acted and given relief, " but subject to the provisions herein contained, " and to the rules and orders to be made by the said " court under this Act."

This section has not been repealed and it applies to this court. The other provisions of the Act of 1870 do not qualify it in any relevant respect ; nor (sub-

(1) [1944] N.I. 134.

ject to an argument which I shall deal with later) do the rules of procedure. Sections 7 and 13 may therefore be said to constitute the foundation of the nullity jurisdiction invoked by the petitioner, for impotence (unlike wilful refusal and other statutory grounds) had long been recognised by the ecclesiastical courts as a ground for annulment when the Act of 1870 became law.

It is also material to observe that while at that time the distinction now drawn between void and voidable marriages was well understood, it was a distinction which went unnoticed by the ecclesiastical courts in the *exercise* of their nullity jurisdiction. Whichever of the recognised grounds was alleged, and quite regardless of whether it led, like bigamy, to the marriage being void or, like impotence, to it being voidable, proof of the petition produced but one result. The marriage was declared to be and to have been null and void to all intents and purposes. The constant "esse et fuisse" of ecclesiastical nullity decrees no doubt reflected the teaching of the Church as to the indissolubility of true marriage. But in England the transfer of jurisdiction by the Matrimonial Causes Act, 1857, to a court which had also power to dissolve the marriage bond led to no material change in this respect and nullity decrees, both there and here, to-day follow in their essentials the ecclesiastical form. It would be a mistake to ascribe this merely to the force of habit and a regard for precedent. In 1866 the nature of the declaration to be made in a wife's suit for nullity on the ground of impotence fell to be settled by the House of Lords in *Lewis v. Hayward* (1), after the decree dismissing her petition had been reversed, and the material part of the order then drawn up was in these terms:—

> ". . . . and it is declared, that the said marriage "celebrated between the respondent John Edward "Hayward and the appellant was null and void "*ab initio.*"

The reasons for adopting this form are not stated in the report but it is clear that it was settled after reservation for their Lordships' consideration and it

(1) (1866) 35 L.J. (P. & M) 105.

must be accepted as conforming with the requirements of section 22 of the Act of 1857 which is virtually identical with section 13 of the Act of 1870. With those provisions in mind it is hard to see what other order could have been made in *Lewis v. Hayward* (1). But the case is important because it is an authoritative recognition of the fundamental juristic distinction between dissolution and the annulment of voidable marriages which in later years seems to have been given less than its full weight by those favouring the view that in their essence these two procedures came to very much the same thing.

While it is clear that the object of section 13 was to provide for continuity in the exercise of the transferred jurisdiction, it can never have been intended to fix either the principles or the rules of the ecclesiastical courts upon their secular successors with a complete rigidity. The conditions that had brought the transfer about, the substitution of a temporal for a spiritual dispensation and the emergence of national jurisdictions as the courts of Christendom declined, were matters which in 1857—and even more in 1870—must have made some degree of flexibility in the terms of transfer appear highly desirable. This consideration on the one hand and, on the other, a marked reluctance to get too far from the law of the Church respecting matrimonial causes, find reflection in the words "as "nearly as may be" of section 13. But the elasticity of this expression is obviously limited and such as to preclude divergence at pleasure. Like the cy-près doctrine of the law of charitable trusts it may curb changes which in themselves would be enlightened and beneficial. The principles on which the ecclesiastical courts acted must still be regarded, just as the nature of a settlor's charitable intentions must still be respected no matter how outmoded those intentions may appear to be. As the provisions of section 13 seem to me to have a close bearing on the question for decision, it is therefore desirable that the constraining effect of the words I have just quoted should be kept in mind from the outset.

(1) (1866) 35 L.J. (P. & M.) 105.

For the petitioner Mr. McGonigal relied upon four propositions which may be stated as follows :—

(1) The residence of the petitioner in Northern Ireland in itself conferred jurisdiction on the court.

(2) Even if that were not so, the respondent had by his conduct submitted to the jurisdiction and had thereby made the court as competent as it would have been had he too been resident or domiciled in Northern Ireland.

(3) The effect of Order 70, r. 7 (1) (which allowed the respondent to be served in England) was to give jurisdiction in this case.

(4) Apart from any other consideration, the court had jurisdiction because the marriage was celebrated in Northern Ireland.

Proposition (1) necessitates a two-fold inquiry. Would it have prevailed in the days of the ecclesiastical courts? And, if not, has the course of authority since been such as to establish it?

In England the Statute of Citations (23 Henry VIII c. 9) forbade the ecclesiastical courts (subject to certain exceptions which are not now material) to cite a person outside the ecclesiastical jurisdiction in which he should be "inhabiting and dwelling".

Thereafter the ecclesiastical law of jurisdiction had a statutory residential element which, so far as I can ascertain, was generally accepted and respected, though instances are not lacking to suggest that on occasion a blind eye was turned to the facts of the situation if the face of the record was in order. I do not think any useful purpose would be served by commenting in this judgment on all the decisions cited in argument on this particular branch of the inquiry. For the most part, they are directed to the question whether the residential requirements of the Statute have been satisfied. They deal with such matters as the quality of the residence or inhabitancy needed as in *Collett v. Collett* (1), the extent to which the husband's residence might be imputed to a respondent wife as in *Whitcomb v. Whitcomb* (2), or the

(1) (1843) 3 Curt. 726. (2) (1840) 2 Curt. 351.

position where the respondent had no fixed place of abode as in *Cooper v. Cooper* (1). But so far as I am aware, there is nothing in the reports to warrant the view that the ecclesiastical courts were at any time prepared to embrace the proposition under discussion and to find jurisdiction where (as here) the respondent was ordinarily resident outside the territorial limits of the court concerned. The Statute of Citations did not, however, apply to Ireland and Mr. McGonigal contended that the jurisdiction of the courts there was not circumscribed as in England. He drew attention to canon 54 of the Church of Ireland canons of 1634, which provided that the ecclesiastical courts should pass sentences in matrimonial causes "concerning "them only, that are then dwelling under their "jurisdiction." He argued that the absence of any reference to the party cited was significant and that, as it could scarcely have been intended that jurisdiction should only arise whenever both parties were resident within the limits, it was, in Ireland, sufficient if one or other was so resident. In my opinion, this submission is not well founded. The Statute of Citations was in its requirements a declaratory enactment and it was so regarded by Dr. Radcliff in the Consistory Court of Dublin in *Cooper v. Cooper* (1). I do not think there was any material difference respecting the basis of jurisdiction between the ecclesiastical law of England and that of Ireland and I cannot regard canon 54 as establishing the contrary. Had there existed a difference as important as that suggested one would expect to find some trace of it in such of the textbooks concerning the practice of the ecclesiastical courts in Ireland as are still available. But the only help I have got from that source points the other way. Thus in "The Clerk's Assistant in "the Practice of the Ecclesiastical Courts" by the Reverend William Cockburn, LL.B. (Dublin, 1753) it is roundly stated (p. 11) that no one is to be cited out of his diocese, and the exceptions to this rule, which are then given, follow so closely those contained in the Statute of Citations as to leave little doubt

(1) (1836) Milw. 373.

that the law it declared was regarded as generally applicable to Ireland.

For these reasons, I am satisfied that the proposition under discussion cannot be founded on the law or practice of the ecclesiastical courts. I come, therefore, to the second branch of the inquiry and turn to the decisions of the civil courts which were relied upon by Mr. McGonigal. In *Roberts v. Brennan* (1), Jeune P. entertained a petition for nullity on the ground of bigamy. The petitioner appears to have been resident in England (though this is not made clear) and the marriage in question was celebrated in the Isle of Man. The respondent was domiciled in Ireland and was served there with the citation. Counsel for the petitioner reminded the court of section 22 of the Act of 1857 and submitted that residence was sufficient to found jurisdiction. Sir Francis Jeune accepted this argument and proceeded to pronounce a decree nisi. As reported, this is not a satisfactory case because the residence of the respondent is not expressly stated. But if the proper inference is that he was resident in Ireland, it may be that jurisdiction was held to exist on the ground of the petitioner's residence. The judgment, however, does not state that. Its substance is to be found in the sentence, "In my view, residence—not domicil—is the test of "jurisdiction in a nullity case." (2). In *White v. White* (3), a woman sought a decree of nullity on the ground of bigamy. She was domiciled and resident in England. The respondent was domiciled and resident out of England. The suit was undefended. In a considered judgment, after hearing counsel for the petitioner and the King's Proctor, Bucknill J., influenced, I think, by *Roberts v. Brennan* (1), held that he had jurisdiction, though he confessed that had the respondent entered an appearance under protest he should have had serious doubts about the matter. In *Hussein v. Hussein* (4), the petitioner, a woman, obtained an annulment on the ground that she had

(1) [1902] P. 143.
(2) [1902] P. 143, 144.
(3) [1937] P. 111.
(4) [1938] P. 159.

been constrained by threats to go through a ceremony of marriage in England with the respondent who was domiciled in Egypt. It would appear that the respondent was also resident in that country and it may, I think, be assumed that the petitioner was resident in England. Henn Collins J. held that he had jurisdiction to entertain the suit but he did not state the grounds for this conclusion. When the report of the argument is read, however, it would seem that the contention in favour of jurisdiction relied on the fact that the marriage had been celebrated in England. On this account I do not think the case has weight as an authority on the point under discussion. Then, in *Robert v. Robert* (1), it was held that the court had jurisdiction to entertain a suit for nullity on the ground of wilful refusal where, at the time the petition was presented, the petitioner was resident in England and the respondent (the man) was domiciled and resident in Guernsey. In the course of his judgment, Barnard J., after a reference to the ecclesiastical courts, proceeds: "Their jurisdiction, however, seems to have "depended upon the residence of the respondent "being within the jurisdiction of an ecclesiastical "court in England, but Bucknill J. in *White orse.* "*Bennett v. White* (2), following the decision in *Roberts* "*v. Brennan* (3), extended this jurisdiction to include "a case where the petitioner was domiciled and "resident in England although the respondent was "both domiciled and resident abroad. I respectfully "agree with Bucknill J.'s decision. In the case now "before me the petitioner was residing here at the "time she filed her petition for nullity, she was subject "to English law and to the best of her belief the "respondent was still serving in England though in "fact she was wrong as to this; it seems to me that "she was therefore entitled to know whether by "English law she was married or not" (4).

Lastly, there is the decision of the Court of Appeal in England in *De Reneville v. De Reneville* (5), in which,

(1) [1947] P. 164.
(2) [1937] P. 111.
(3) [1962] P. 143.
(4) [1947] P. at 167.
(5) [1948] P. 100.

amongst other matters, it was held, overruling *Roberts v. Brennan* (1) and *Robert v. Robert* (2) in so far as they decided the contrary, that there was no authority for the proposition that jurisdiction in nullity suits would follow from the residence of the petitioner alone. I see no escape from that conclusion and I respectfully agree with it. I am, therefore, in the position of being unable to find any satisfactory basis for the proposition under consideration either in the law and practice of the ecclesiastical courts or in the decisions that have been pronounced since those courts lost their matrimonial jurisdiction.

Proposition (2) was founded on certain letters written by the respondent's solicitor after service had been effected. For present purposes it will be enough to epitomise these by saying that they show the respondent anxious to get the marriage brought to an end quickly and indifferent whether that is done here or elsewhere. In the last of the series, dated January 26, 1954, his solicitor sums the situation up in saying: "He (the respondent) desires to have the "marriage dissolved in one way or another, and unless "the suit is prosecuted more speedily, it is my client's "intention to petition in the English Courts for a "divorce on the grounds of desertion."

Now I think there can be little doubt that in the ecclesiastical courts an appearance without protest was generally regarded as a submission to the jurisdiction, and that a respondent so appearing would not be heard to say thereafter that he resided without the limits of the court and so was not subject to its decrees: see *Donegal v. Donegal* (3). In some cases a form of estoppel rather than submission by consent seems to have been treated as the basis of the jurisdiction thus assumed, for the party cited was usually described in the document served as dwelling within the territory of the court, and if that averment was not disputed it would be taken as accepted and therefore true. Thus on the application for a writ of pro-

(1) [1902] P. 143.
(2) [1947] P. 164.
(3) (1821) 3 Phill. Ecc. 586; on appeal; (1822) 1 Add. 5.

hibition in *Donegal v. Donegal* (1), the Vice-Chancellor, Sir John Leach, after pointing out that Lady Donegal, the party cited, might have protested against the jurisdiction on the ground that she was resident in Ireland, proceeds: "Lady Donegal, however, does not "think fit to take that objection; the objection is "before her when she appears, not for the purpose of "stating the objection, but she appears for the pur- "pose of proceeding with the case and entering into "the merits of the suit; and it is in fact an admission "on her part that she is properly described as being "resident within the parish of St. James, Westminster, "and is within the jurisdiction of this Court in which "the plaintiff desires to entertain the question."

In the present case no estoppel of this sort could arise for the petition shows the respondent to be resident and domiciled in England. But in any event, and irrespective of what the petition says, I doubt very much if an unqualified appearance would to-day suffice of itself to confer jurisdiction in nullity suits. For one thing, where some state of fact as such residence is relied upon as founding jurisdiction in this sphere it can hardly now be placed in the category of procedural requirements or formalities that may be waived and thereafter disregarded. For another, I find it difficult to discover any sound foundation for the view that in proceedings of this nature the competence of the court may depend solely on the personal attitude of the respondent. As Lord Greene said in *De Reneville v. De Reneville* (2): "I should have thought that on "principle the exercise of jurisdiction in matrimonial "causes affecting status could not depend on the "submission of the respondent or his refusal to submit "to the jurisdiction".

I need not, however, proceed to decide the effect of an unqualified appearance, in a case such as the present, because here no appearance has in fact been entered. But even assuming that an appearance without protest would have conferred jurisdiction, it

(1) (1821) 3 Phill. Ecc. 597, 607.

(2) [1948] P. 100, 113.

does not follow that the same result can be produced in some less formal manner. The correspondence in this case certainly supplies no evidence of submission equivalent to the entering of an unconditional appearance. I cannot regard it as evincing more than an impatient desire to have the marriage terminated somewhere, and I am firmly of the view that it contains nothing sufficient of itself to create jurisdiction of the sort invoked. I am therefore against the petitioner on this aspect of the case also.

Proposition (3) turns on the provision made by Order 70, r. 7 (1) that "a petition, notice or other "document in a matrimonial cause or matter may be "served out of the jurisdiction without leave." Stated shortly, the argument was that jurisdiction is created by the conjunction of two elements, the existence of a cognisable subject matter and the fulfilment of a procedure whereby the party proceeded against can be made amenable; that the first of these elements was satisfied by the transfer of jurisdiction in nullity matters effected by the Act of 1870, and that the second was supplied by Order 70, r. 7 (1) and the fact of service thereunder. This contention was supported by an analogy drawn from the manner in which the jurisdiction of the civil courts had been enlarged by such enactments as sections 18 and 19 of the Common Law Procedure Act, 1852, (which enabled service to be effected in certain instances outside England) and section 34 of the Common Law Procedure Amendment Act (Ireland), 1853, (which provided for substituted service in certain cases in respect of defendants outside Ireland); and later by the terms of Order 11, r. 1.

In my opinion this submission must be rejected. In the first place, I think it goes too far to be sound. There being no question as to the first element of subject matter, it would mean that this court could entertain any matrimonial cause of the kind transferred from the ecclesiastical courts on proof of service of the petition, and regardless of the domicile or residence of the parties, or either of them, or of the place of the celebration. Such a sweeping and un-

fettered jurisdiction in suits affecting status would be highly undesirable and I know of no authority for it. And, secondly, I think the better view is that the power to serve anywhere conferred by Order 70, r. 7 (1) did not really add something new as respects the transferred jurisdiction. The ecclesiastical courts seem to have enjoyed a similar power, and though the Statute of Citations declared the limited nature of their jurisdiction it did not prohibit service outside the limits of a court which had jurisdiction. The residence of the party cited was all important but he could be served where found. See the judgment of Dr. Lushington in *Collett v. Collett* (1).

A somewhat similar submission, founded on section 42 of the Act of 1857, was addressed to Horridge J. in *Graham v. Graham*, (2) and is dealt with in the following passage of his judgment: " It was further " contended before me that because s. 42 of the " Matrimonial Causes Act, 1857, provided for service " within or without His Majesty's Dominions, if " service was in fact effected of proceedings issued " without jurisdiction, the very fact of service gave " jurisdiction to the Court; but I cannot accede to this " proposition,as it seems to me that s. 42 only applies " to process properly instituted."

I think that applies here and that service alone cannot give this court competence.

That brings me to proposition (4). Has this court jurisdiction on the sole ground that the marriage was celebrated in Northern Ireland? This is a difficult question and its consideration reveals what, on any view, must be regarded as an unsatisfactory state of affairs. Before going further it may clarify the issue to observe that this question has to be distinguished from considerations of conflict and conclusiveness. That is not to say that such considerations are irrelevant; but the question does not necessarily depend on the choice of law or on whether the jurisdiction invoked is such that its judgments will be accepted elsewhere. It is whether this court has power to make a decree annulling the marriage which will be binding in this jurisdiction.

(1) (1843) 3 Curt. 726. (2) [1923] P. 31, 37.

It may be convenient to commence by asking whether the court of the domicile has an exclusive jurisdiction because, if that be the situation, proposition (4) must be rejected without more ado, the relevant domicile being, as matters stand, the English domicile of the respondent. This brings me at once to the much debated case of *Inverclyde v. Inverclyde* (1), in which Bateson J., founding on the decision of the House of Lords in *Salvesen v. Administrator of Austrian Property* (2), and, in particular, on a dictum of Lord Phillimore in that appeal, held that a decree annulling a marriage which was voidable because of impotence was the equivalent of a dissolution and could therefore only be pronounced by the court of the domicile. That view was much criticised in this jurisdiction by Andrews L.C.J. in *Mason v. Mason* (3), while in England it was dissented from by Hodson J. (as he then was) in *Easterbrook v. Easterbrook* (4), and by Pilcher J. in *Hutter v. Hutter* (5). In *Easterbrook v. Easterbrook* (4) the suit was undefended. The petitioner, domiciled in Canada but resident in England, sought to have his marriage annulled on the ground of his wife's wilful refusal, she also being resident in England and, it was said, domiciled there as well. Hodson J. held he had jurisdiction and said: "I am "unable, with all respect to Bateson J., to see the "distinction for the purpose of jurisdiction which he "appears to have drawn in *Inverclyde* (*otherwise Tripp*) "*v. Inverclyde* (1) between voidable and void marri- "ages" (6). In *Hutter v. Hutter* (5), an American soldier, domiciled in the United States and resident in England, petitioned for a decree of nullity on the ground of the wilful refusal of the respondent, also resident in England. The suit was undefended but the question of jurisdiction was fully argued by counsel for the King's Proctor. In the course of a careful judgment Pilcher J. stated his reasons for refusing to follow *Inverclyde* (1) and held that the residence of the parties conferred jurisdiction.

(1) [1931] P. 29.
(2) [1927] A.C. 641.
(3) [1944] N.I. 134.
(4) [1944] P. 10.
(5) [1944] P. 95.
(6) [1944] P. 10, 11.

If these three decisions were the last word on the subject, I should be content to say I shared their views on the point under discussion and to abstain from any detailed scrutiny of the *Inverclyde* doctrine (1). In *Casey v. Casey* (2), however, the Court of Appeal in England went a considerable distance towards restoring the authority of *Inverclyde* (1) and in view of this and of the respect which the decisions of that court command in this jurisdiction, it is desirable that I should follow the reference I must now make to *Casey v. Casey* (2) with a summary of the reasons which have led me to the conclusion that *Inverclyde* (1) was wrongly decided.

The facts of *Casey v. Casey* (2) correspond so closely to those of the present suit that if the decision of the Court of Appeal is to be followed it must rule this case. The petitioner married her husband in England. He was domiciled and ordinarily resident in Canada. At the time of the marriage she was domiciled and ordinarily resident in England. Her petition sought annulment on the ground of wilful refusal. It was admitted that when it was filed her domicile was Canadian and it appears she was then resident in England. The court held there was no jurisdiction. This conclusion was unanimous but the same cannot be said of the reasoning contained in the two judgments delivered. Bucknill L.J. (with whom Cohen L.J. concurred) was influenced by two considerations. First, that the balance of hardship was tipped in favour of the respondent and, secondly, that the annulment of a voidable marriage was (as Bateson J. had held) not really to be distinguished from a dissolution. This, with a qualification which was shared by the other members of the court, appears from the following passage towards the end of his judgment: "My "opinion in favour of dismissing this appeal is based, "partly on the balance of hardship to the parties, "but mainly on the analogy of the rule that the court "of the domicile of the husband is the sole court with "jurisdiction to dissolve a valid marriage. It seems "to me reasonable that a similar rule should be applied

(1) [1931] P. 29. (2) [1949] P. 420.

" in principle to a marriage which is merely voidable " on the ground of wilful refusal to consummate it. " There may be an exception to the rule in the case of " a voidable marriage where both parties are resident " in the country where the petition is filed, but I do " not see the necessity of making an exception on the " ground that the marriage has been celebrated in the " country where jurisdiction is invoked " (1). Somervell L.J., on the other hand, did not adopt the basis of Bateson J.'s decision in *Inverclyde* (2), namely, that suits for nullity in which the marriages are voidable are similar to suits for dissolution, and considered it clear that in *De Reneville* (3) the Court of Appeal had not accepted that basis. But he was of opinion that, in the circumstances, the celebration of the marriage in England did not attract jurisdiction there. The following paragraph from his judgment makes this clear: " It may well be con- " venient that the courts of the country, where a " ceremony of marriage has been performed, should " have jurisdiction to entertain suits where the validity " of that ceremony is in issue. Where, however, the " ceremony is not attacked, a different issue arises " and there seems to me no ground in principle for " giving jurisdiction to the courts of the country of " the ceremony. The present case illustrates the " inconvenience. The respondent husband, whose " status is affected, is domiciled and resident in " Canada and the events mainly relied on in support " of the petition took place in Canada. *De Reneville v.* " *De Reneville* (3) decided that in the case of a voidable " marriage the fact that the petitioner was, previous " to the marriage, domiciled here is not a ground on " which jurisdiction can be founded. The mere fact " that the ceremony of marriage took place in a " country does not seem to me a ground for founding " jurisdiction in cases where the matters alleged in the " petition do not in any way dispute the validity of the " ceremony as effecting a marriage " (4).

I must refer later to the reasoning of this passage.

(1) [1949] P. at 431.
(2) [1931] P. 29.
(3) [1948] P. 100.
(4) [1949] P. at 433.

At the moment the question is whether the majority view in *Casey v. Casey* (1) should be accepted as establishing the decision in *Inverclyde's* case (2). Though not binding on this court it is, of course, a view which is entitled to the most careful consideration; but having endeavoured to give it that I find myself, with all the respect due to the distinguished judges concerned, unable to share it. My reasons for this and for thinking *Inverclyde* (2) wrongly decided fall under two heads which may be stated thus:

Firstly, in *Salvesen's* case (3) both parties to the marriage were domiciled in Germany. There, at Wiesbaden, a court of the domicile, admittedly competent for the purpose, declared the marriage to have been null and void on the ground that the formalities required by the law of France, where it was celebrated, had not been duly observed. What the House of Lords decided was that the decree of the Wiesbaden court affected the status of the parties and, being that of a competent court of the domicile, was therefore in the nature of a judgment in rem and binding elsewhere. Had the House held that in nullity suits the court of the domicile was not only conclusive but exclusive as well, the correctness of Bateson J.'s decision would be beyond challenge and the present question could not have arisen. But the House did not hold that, and Lord Haldane, who delivered the leading opinion was at pains to make the limited nature of the issue clear. Thus, he says: "The real question is simply whether "the Court of the domicil was competent to dispose "conclusively and finally of the question before it. "If so it does not matter in law whether it had an "exclusive jurisdiction" (4). And, again: "Whether "there cannot be jurisdiction which is not that of the "domicil in restricted instances to entertain a suit for "nullity is a question we have not before us for "determination. For, as I have pointed out, the only "relevant issue is whether the German Court was "competent as against all other courts conclusively "to declare the marriage in the present suit void" (5).

(1) [1949] P. 420.
(2) [1931] P. 29.
(3) [1927] A.C. 641.
(4) Ibid. 652.
(5) Ibid. 654.

There is nothing else in the case to suggest that the issue was wider than this and Lord Haldane's opinion seems to have had the assent of his colleagues, including Lord Phillimore. But Lord Phillimore does say parenthetically that in his opinion "the Wiesbaden Court was the only competent Court for these "parties." This dictum is what Bateson J. built on in *Inverclyde* (1). But it was clearly obiter and the opinions of the other noble Lords do not seem to lend it support. Bateson J. did not, however, take that view for he said immediately after a reference to the dictum: "It is to be noted that Lord Dunedin "and Lord Warrington expressly agree with Lord "Phillimore's speech. They said so in terms" (2). So, indeed, they did (as did Lord Phillimore with the speech of Lord Haldane) but it is surely going too far to spell out of a general concurrence an acceptance of each and every extraneous observation contained in the agreed deliverance.

I am, accordingly, of opinion that the decision in *Inverclyde* (1) is not supported by the decision in *Salvesen's* case (3).

Secondly, as already indicated, the judgment of Bateson J. depends upon the assumption of a close analogy between the processes of annulling a voidable marriage and of dissolving a valid marriage. Thus he accepts the argument that "Nullity on the ground of "impotence is a suit to avoid a marriage and is in "essence a suit to dissolve it" (4). And he adds: "It seems to me that if the principle is sound that in a "suit for dissolution of marriage in divorce jurisdiction "depends on domicil it must equally so depend in a "suit for dissolution of marriage on the ground of "impotence. To call it a suit for nullity does not "alter its essential and real character of a suit for "dissolution" (5). Now I cannot help feeling that, in the words of Lord Greene M.R. in *De Reneville* (6): "It is perhaps unfortunate that a form of decree which "was appropriate when a marriage was regarded as

(1) [1931] P. 29.
(2) Ibid. 44.
(3) [1927] A.C. 641.
(4) [1931] P. at 41.
(5) Ibid. 42.
(6) [1948] P. 100, 110.

"indissoluble and could only be got rid of by decreeing "that it had never taken place is still used indiscrimin- "ately in the cases of both void and voidable marri- "ages"; and that this, as Lord Greene added, is particularly anomalous in the case of the new grounds of nullity—as laid down by the English Act of 1937 and the corresponding provisions for Northern Ireland in the Act of 1939. I therefore find no difficulty in appreciating the motives of those who want to assimilate the process whereby voidable marriages are terminated to that followed in cases of dissolution. Such a change would have much to commend it. It would tend to reduce the possibility of conflicting decisions and it would make for greater certainty. To some it would also appeal as more in keeping with the decencies of life and the respect due to the married state. But are the courts free to make this change? That seems to depend, so far as this court is concerned, on the directions of the legislature as contained in section 13 of the Act of 1870. Can I hold as Bateson J. held and at the same time obey the injunction to act and give relief on principles as nearly as may be conformable to those followed by the ecclesiastical courts? I do not think I can. Those courts, as already pointed out, did not give relief on any principle which recognised a distinction between void and voidable marriages. If they annulled they annulled ab initio, and the idea that in its essence this exercise of their jurisdiction approximated to a dissolution would have been repudiated by them with the utmost vigour. It was a fixed principle of the ecclesiastical courts that any annulment was in substance as well as form a completely different thing from dissolution and I therefore feel that the statute is against the course favoured by Bateson J. in *Inverclyde* (1) and by Bucknill L.J. in *Casey v. Casey* (2). The judgments in those cases do not advert to section 22 of the Act of 1857, the English equivalent of section 13 of the Act of 1870, but I see no way round it once the issue is placed in its proper historical and statutory setting.

(1) [1931] P. 29. (2) [1949] P. 420, 424.

To these reasons for holding the *Inverclyde* doctrine unsound I would add a further consideration. Even if I am wrong in the view expressed and the doctrine is now to be regarded as a part of the law of England, it seems to me that the statutory position in Northern Ireland leaves little ground for its adoption in this jurisdiction.

This court had no power to dissolve a marriage until after the commencement of the Act of 1939. Had he been sitting here instead of in England when he decided *Inverclyde* (1), I think Bateson J. would have had great difficulty in reaching the conclusion he did. He could not have assimilated the process of annulling a voidable marriage to that of dissolving a valid marriage because the only form of dissolution then possible in Northern Ireland was that effected by an Act of Parliament. He would have been exercising the powers of the ecclesiastical courts without any concurrent jurisdiction to appeal to by way of analogy. If the matter ended there an answer to this might be found in the fact that the petition in the present case was filed long after the Act of 1939 came into operation. The position, however, is not as simple as that in view of the provisions of section 9 (1) and section 28 (1) of the Act of 1939.

Section 9 (1) enacted that a marriage should be voidable on a number of new grounds of nullity including wilful refusal, a ground which may supervene after the marriage and without necessarily being related to any defect existing at the time of its celebration. Then section 28 (1) provided that :

> " In all suits and proceedings under this Act in " respect of . . . nullity of marriage . . . the court " shall proceed and act and give relief on principles " and rules which, in the opinion of the court, shall " be as nearly as may be conformable to the prin- " ciples and rules on which the court acted in respect " of the same or like matters before the commence- " ment of this Act . . . ."

Now, I think the effect of that provision must be

(1) [1931] P. 29.

that if this court could not have applied the *Inverclyde* doctrine (1) before the commencement of the Act of 1939 it ought not to apply it in cases of wilful refusal or any of the new grounds of nullity arising since then. And if that be so it would be highly anomalous and quite illogical to put nullity suits on the ground of impotence in a different category for this purpose.

On these grounds I hold that the decision in *Inverclyde's* case (1) does not dispose of proposition (4).

But if *Salvesen's* case (2) did not make the court of the domicile the only court in nullity suits, it certainly went far to make domicile an independent test of jurisdiction in such suits, at any rate where the parties have or are to be taken as having the same domicile. In its results the decision therefore seems to have extended the nullity jurisdiction beyond the residential restrictions to which the ecclesiastical courts were subject. Proposition (4) postulates a further extension and the next question is whether the jurisdiction invoked must depend either on domicile or the residence of the respondent, or whether it can be supported without regard to such considerations and solely on the ground that the court is the court of the place of celebration, or the court of the ceremony as I shall call it for short.

There is, undoubtedly, a substantial foundation in authority for the view that, at least in certain categories of nullity suits, the court of the ceremony has jurisdiction just because it is the court of the ceremony. The jurisdiction to dissolve a vinculo conferred in England by the Act of 1857 commenced a slow process of development which ultimately led to the establishment of the principle that domicile was necessary to found jurisdiction in cases of dissolution. I think it is true to say that another process was also at work respecting suits for nullity which reflected the view, apparently held strongly in some quarters, that an English court was the natural and proper place in which to determine the validity of an English marriage. Indeed, it would seem that the ecclesiastical courts

(1) [1931] P. 29. (2) [1927] A.C. 641.

had for some time before the transfer of their matrimonial jurisdiction laid weight on considerations of this kind. Thus, in 1822 in *Chichester v. Donegal* (1) Sir John Nicholl, in holding that the respondent, the Marchioness of Donegal, was bound to the jurisdiction, having appeared without protest though actually resident not in England but in Ireland, included in his reasoning the following passage—"Add to this," he said, "that the parties were married in London—it "is therefore the 'forum contractus'—also, that the "validity of the marriage is to be pronounced upon "by the law matrimonial of this country, not of "Ireland; a country to which our marriage Act does "not extend; and the law of which, we all know, "to be materially different from that of England, "as to what is, and what constitutes, a valid marriage "—a consideration upon which alone to have instituted this proceeding in Ireland, the only other "alternative, would have favoured strongly of that "fraud and collusion, imputations of which are so "liberally cast in the act of Court". In 1860, shortly after the transfer of jurisdiction, the question was considered by the full Court for Divorce and Matrimonial Causes consisting of the Judge Ordinary (Sir Creswell Creswell), Channel B. and Keating J. in *Simonin v. Mallac* (2). There, the parties were natives of France and domiciled in that country. They were married in London in June, 1854, by licence according to the law of England, having come over for that purpose. A couple of days later they both returned to France. The man then refused to celebrate the marriage according to French law and the woman obtained in the French courts a decree of nullity on the ground that the consent of parents had not been given. She subsequently came to reside in England and petitioned there for annulment. The citation was served on the respondent in Naples and he did not appear. On the question whether it had jurisdiction in the circumstances the court, after argument, held that it had. The basis of this ruling appears from the

(1) (1822) 1 Add. 5, 20. (2) (1860) 2 Sw. & Tr. 67.

following excerpts from the judgment of the Judge Ordinary: "This question," he says, "therefore "depends upon the first proposition, that the parties, "by professing to enter into a contract in England, "mutually gave to each other the right to have the "force and effect of that contract determined by an "English tribunal" (1). And, later: "There is "nothing contrary to natural justice in calling upon "him (the respondent) to have the validity or in-"validity of a supposed contract ascertained and "determined by the tribunal of the country where it "was entered into by him; for according to Lord "Stowell, in *Dalrymple* and *Dalrymple* (2), it is an "indisputable rule of law, as exercised in all civilised "countries, that a man who contracts in a country "engages for a competent knowledge of the law of "contracts in that country. If he rashly presumes "to contract without such knowledge, he must take "the inconveniences resulting from such ignorance "upon himself, and not attempt to throw them upon "the other party" (2). In 1877 the Court of Appeal had to consider in *Sottomayor v. De Barros* (3), the law to be applied in a suit for nullity between two Portuguese subjects who were both assumed to be domiciled throughout in Portugal. They were first cousins and after residing in England for some years they got married there in 1866 and returned to Portugal in 1873. By Portuguese law this marriage was illegal on account of the relationship. The Court of Appeal held that the law of the domicile ruled the case and that the marriage should accordingly be annulled. In this it distinguished *Simonin v. Mallac* (4) on the ground that the issue there concerned the ceremony and was therefore governed by the lex loci celebrationis whereas the Portuguese law affected the personal capacity of the parties to contract marriage. The decision in *Simonin v. Mallac* (4) on the question of jurisdiction was not, however, challenged in that case, and so far as I am aware it has never been overruled. It is also to be observed as marking the

(1) Ibid 75.
(2) (1811) 2 Hagg. Con. 54, 61.
(3) (1877) 3 P.D. 1.
(4) (1860) 2 Sw. & Tr. at 75.

distinction between choice of law and jurisdiction that in *Sottomayor v. De Barros* (1) the competence of the English courts to entertain the suit was not questioned. It is true that the point was not raised or argued but as the case was heard first by Sir Robert Phillimore (2) and then in the Court of Appeal by James, Baggally and Cotton L.JJ. and was eventually disposed of by Sir James Hannen (3) with the Queen's Proctor represented on all three occasions, it would, I think, be reasonable to assume that there was nothing obviously novel or out of the ordinary about it from this point of view. I must next refer to *Linke v. Van Aerde* (4). That was a woman's suit for nullity on the ground of bigamy. The marriage was celebrated in England. Both the parties were foreigners and the case proceeded on the assumption that the domicile was foreign. The respondent appears to have been served in England, but the report does not state that he was resident there when the petition was presented and so far as I can see no point as to his residence was made on behalf of the petitioner. Though the suit was undefended Gorell Barnes J. considered his jurisdiction to give the relief sought. He is reported as saying that "the marriage contract was entered "into here, and on that ground this court was asked to "to deal with it." Then, after a reference to *Simonin v. Mallac* (5) and to *Sottomayor v. De Barros* (1), he reached the conclusion that his jurisdiction to deal with the question of the validity of the marriage was clear.

In Ireland the basis of jurisdiction in nullity suits was considered by Andrews J. in *Sproule v. Hopkins* (6). In that case the petition was presented by a woman seeking a decree of nullity on the ground of bigamy and, alternatively, a divorce a mensa et thoro on the ground of the respondent's adultery and cruelty. The so-called marriage took place in Ireland. The petitioner was domiciled and resident there. The respondent, who was served in England, filed an

(1) (1877) 3 P.D. 1.
(2) (1876) 2 P.D. 81.
(3) (1879) 5 P.D. 94.
(4) (1894) 10 T.L.R. 426.
(5) (1860) 2 Sw. & Tr. 67.
(6) [1903] 2 I.R. 133.

act on petition objecting to the jurisdiction on the ground that he was both domiciled and resident in England. In the course of what I may with respect describe as a characteristically careful judgment, Andrews J., after referring to *Simonin v. Mallac* (1) and *Sottomayor v. De Barros* (2), stated his conclusion concerning the nullity claim in the following terms—

"I hold that the contract of marriage having been "entered into and the marriage celebrated in Ireland, "this Court is competent to hear and decide the "question in this suit of the validity of the marriage "on the ground of its having been, as alleged, a biga- "mous marriage on the part of the respondent, irrespec- "tive of any question of domicil or residence" (3).

Berthiaume v. Dastous (4), was cited for the passage in the judgment of the Judicial Committee delivered by Lord Dunedin which reads as follows:

"If there is one question better settled than any other "in international law, it is that as regards marriage— "putting aside the question of capacity—locus regit "actum. If a marriage is good by the laws of the "country where it is effected, it is good all the world "over, no matter whether the proceeding or ceremony "which constituted marriage according to the law of "the place would or would not constitute marriage "in the country of the domicil of one or other of the "spouses. If the so-called marriage is no marriage "in the place where it is celebrated, there is no marriage "anywhere, although the ceremony or proceeding if "conducted in the place of the parties' domicil would "be considered a good marriage."

Reference must also be made to two Scottish cases in which the jurisdiction in nullity actions was considered. The first of these is *MacDougall v. Chitnavis* (5). There a Scots woman had married an Indian in Scotland. After the parties had lived together for some years, first in Edinburgh and later in India, the woman returned to Scotland and brought an action of declarator of nullity of marriage on the ground, inter alia, that the

(1) (1860) 2 Sw. & Tr. 67.
(2) (1876) 2 P.D. 81; 3 P.D. 1; 5 P.D. 94.
(3) [1903] 2 I.R. 133, 136.
(4) [1930] A.C. 79, 83.
(5) [1937] S.C. 390.

man, being a Hindu, was incapable of contracting a valid marriage outside Hinduism. At the date of the action he, the defender, was domiciled and resident in India. Lord Jamieson, after considering the leading authorities, concluded that the court, as the forum loci celebrationis, had jurisdiction to entertain the case, which, however, he dismissed on the merits. On appeal these conclusions were affirmed in the First Division, though not without some expression of doubt by Lord President Normand. The other Scottish case is *Prawdzic-Lazarska v. Prawdzic-Lazarski* (1). Both parties in it were of Polish origin and had married in 1940 in Scotland where they lived until 1947 when the man went to France where he thereafter remained. In the action the woman sought to have the marriage declared void on the ground that at the date thereof the defender was already married to a woman in Poland. The defender challenged the jurisdiction but the Lord President, Lord Cooper, sitting in the Outer House, held that the Court of Session, as the forum loci celebrationis, was competent to entertain the suit. "There is," he says, "a long series of "decisions, both Scottish and English, beginning with "*Simonin v. Mallac* (2), in which Scottish and English "Courts have assumed jurisdiction to annul a void "marriage which had been celebrated in Scotland or "England respectively, irrespective of the domicile or "residence of the parties, or at any rate of the re-"spondent" (3). And later he adds this –"It is true "that in *Von Lorang* (4) there are certain *dicta*, notably "in the opinion of Lord Phillimore, which suggest a "different solution where both parties are subject to "the same personal law, whether that law falls to be "discovered by reference to domicile or to nationality. "It is also true that in *MacDougall* (5) Lord President "Normand thought that the whole question ought to "be more fully considered, but he did not carry his "misgivings beyond the expression of a doubt. Later "English decisions, culminating in *De Reneville* (6),

(1) [1954] S.C. 98.
(2) (1860) 2 Sw. & Tr. 67.
(3) [1954] S.C. 98.
(4) [1927] S.C. (H.L.) 80.
(5) [1937] S.C. 390.
(6) [1948] P. 100.

" and the discussion in Cheshire, Private International " Law, (4th ed.) pp. 342 ff., rather suggest that the " alternative solution adumbrated by the learned " judges who have indicated doubts may create a new " difficulty for every difficulty overcome."

In the light of the foregoing decisions it must, in my opinion, be accepted that the court of the ceremony has, as such, a jurisdiction to annul. The question then is whether that jurisdiction extends to voidable marriages, or whether it is limited to void marriages. If I understand him aright Somervell L.J. in the passage I have quoted from his judgment in *Casey v. Casey* (1) would, indeed, seem to restrict the jurisdiction to one particular category of void marriage, namely, that in which the ceremony is attacked. I find it difficult, however, to see why if the court of the ceremony is competent to adjudicate on matters of form its jurisdiction should stop there and leave it incompetent to rule upon other grounds for annulling a void marriage. I think the current of authority is against this distinction which would, for example, preclude the court of the ceremony from pronouncing a decree on the ground of bigamy. When one comes to the voidable marriage, however, there is little guidance in authority and the question must be determined on general principles.

The nature of the grounds for the avoidance of voidable marriages may be regarded with reference to impotence alone as, by statute, the new statutory grounds are, as nearly as may be, to be dealt with on similar principles. The impotence recognised by the ecclesiastical courts as justifying annulment had to exist at the time of the marriage and, once that was established, an essential ingredient of the matrimonial bond—call it what one may—was held to be missing. That I understand to have been the principle acted upon by the ecclesiastical courts in granting this form of relief not only in 1857 but much earlier and before the classification of void and voidable had gained currency or significance. So far, then, as respects the

(1) [1949] P. 420.

principle underlying the exercise of the jurisdiction to annul, there does not seem to be sound ground for distinguishing between the void and the voidable marriage.

Considerations respecting the choice of law are not conclusive, though on this point they seem, if anything, to favour the court of the ceremony for I very much doubt if the question of capacity to marry which is to be determined by the law of the domicile has to do with more than juristic capacity. Whether a contracting party is capable in the physical sense of discharging the obligations of matrimony seems to be so linked with the nature and quality of those obligations as to be, naturally and aptly, a matter for the lex loci contractus. I need not, however, pursue that general observation the length of decision as the relevant law respecting impotence as a ground for annulment is the same in both England, the place of the domicile, and Northern Ireland.

Nor do I find much help in considerations of hardship and convenience such as have been called in aid on occasion, as in *Casey v. Casey* (1). For one thing it is very difficult to define jurisdiction by reference to such matters ; for another they supply no objective test of general applicability. What works hardship or inconvenience may well depend on the merits or the facts of the particular case.

In the end, it seems to me that the question must be resolved by asking whether a jurisdiction which necessitates a division of the grounds of nullity according to whether the marriage concerned is void or voidable and which attaches to one of those categories but not to the other, accords with the provisions of section 13 of the Act of 1870. The difficulty of this test is that either view must tend to produce a further divergence from the principles respected by the ecclesiastical courts. If, on the one hand, no distinction is made between void and voidable marriages, then the divergence which occurred when the court of the ceremony was recognised as having some juris-

(1) [1949] P. 420.

diction irrespective of the residence of the parties will be extended. But if, on the other hand, the nullity jurisdiction of the court of the ceremony is limited to void marriages, a severance of subject matter will be acknowledged which in itself and its consequences would have been quite alien to the doctrine and practice of the ecclesiastical courts.

Whatever its difficulties in other respects, the choice thus offered presents, in my opinion, no real dilemma from the point of view of section 13. The splitting of the nullity jurisdiction as between void and voidable marriages would, to my mind, work a far greater departure from the principles on which the ecclesiastical courts acted than would the further curtailment of the residential requirement. The latter derived from considerations of comity and convenience and savoured of procedure rather than subject matter. No doubt, as I have indicated earlier, it amounted to more than a mere matter of procedure, but it was something that could be modified without prejudice to the essential concepts and principles on which the matrimonial jurisdiction was founded, and in the nature of things some degree of modification was inevitable when the numerous diocesan jurisdictions became merged in a single national jurisdiction. In contrast to this the jurisdiction to annul was indivisible in principle, for there was but one ultimate issue for the court, namely, whether or not the marriage was valid at its inception, and all the recognised grounds of annulment were relevant to that issue. In the absence, therefore, of some compelling reason to the contrary I think the directions of section 13 would be better met by holding that the court of the ceremony has a complete jurisdiction in nullity cases rather than a jurisdiction which is exercisable if the marriage is void but not if it is voidable.

Is there, then, some compelling reason against this view? If, as I would hold, the *Inverclyde* doctrine (1) is either unsound, or inapplicable in this court, there does not seem to be anything in authority to supply

(1) [1931] P. 29.

such a reason. Nor can I find sufficient for the purpose in considerations of public policy. The concept of an exclusive jurisdiction, in matters affecting status, which is based on domicile still has its attractions despite the problems it has encountered in recent years. But it can hardly be regarded as affording any cogent ground for drawing a distinction in this connection between the void and the voidable marriage as status may be as much involved by the annulment of the one as by the annulment of the other. In any event it cannot well settle the present question if the decision in *Inverclyde* (1) has been rightly rejected; and apart from that it is not, I think, as easily applied to cases which, as matters stand, are cases of annulment and nothing else in point of law, as it is to cases of dissolution. In the absence, then, of an exclusive jurisdiction is there any sufficient reason why, in the public interest, the court of the ceremony should be more restricted in its [illegible]ty jurisdiction than the court of the respondent's residence? I do not think there is. No doubt such a restriction would, as already observed, tend to reduce the risk of conflicting decisions, but that argument might be aimed in several directions and I cannot regard it as enough to offset the provisions of section 13, if, as I consider those provisions lean against the severance which would result from a restriction of this nature. I incline to the view that it would be a mistake to put the jurisdiction of the court of the ceremony on a lower plane than that of the court of the respondent's residence. There is much to be said for committing any plea that strikes at the creation of a valid marriage bond—be it one of bodily or mental or juristic incapacity or of a failure to observe the requisite formalities—to the court of the place where the bond was forged. It seems the natural forum to decide such issues and in practice it will often be that best versed in the law to be applied.

I therefore conclude that proposition (4) is well founded and that this court, as the court of the cere-

(1) [1931] P. 29.

mony, has jurisdiction to grant the relief now sought by the petitioner.

Having regard to the findings of fact already stated I accordingly pronounce a decree nisi.

Decree nisi.

Solicitors for the Petitioner: *Wray & Baxter.*

Solicitor for the Attorney-General: *Chief Crown Solicitor.*

J. P.

ULSTER TRANSPORT AUTHORITY v. WILLIAM E. ARDILL LTD. (1).

Road Transport—Carrying merchandise for reward—Hire of vehicle accompanied by transfer of services of driver—Driver leaving employment of owner and becoming employed by hirer—Transport Act (Northern Ireland), 1948 (12 & 13 Geo. 6, c. 16), s. 18.

S. 18 (1) of the Transport Act (Northern Ireland), 1948, prohibits the use by any person other than the Ulster Transport Authority of a motor vehicle on the public highway to carry for reward any passengers or luggage or merchandise except with the consent of the Authority and the approval of the Ministry of Commerce. By the proviso to s. 18 (2) (*b*) where an agreement for the hire of a motor vehicle which is used to carry merchandise on a public highway is accompanied by the transfer to the person hiring the vehicle of the services of a driver thereof, the person by whom the vehicle has been let on hire shall be deemed to carry such merchandise for reward.

A. agreed to supply a motor lorry on hire to B. complete with a driver and helper for the sum of £27 per week. This agreement was subsequently modified so as to provide that the driver and the helper should, if they were agreeable, leave the employment of A. and become employed by B., and that the sum payable for the hire of the lorry should thereupon be reduced by the amount of the wages paid to the driver and the helper.

The lorry was subsequently used by B. for the carriage of his own merchandise in accordance with these modified terms, and on A. being charged with an offence against s. 18 (1) of the Act it was found as a fact that at the material time the driver and the helper were in the employment of and acting under the control of B.

Held, that on these facts the agreement between A. and B. was an agreement for the hire of a motor vehicle accompanied by a transfer of the services of a driver thereof within the meaning of the proviso to s. 18 (2) (*b*) of the Act, and that accordingly A. was guilty of an offence under the section.

(1) In the Queen's Bench Division before Black L.J. and Sheil J.: July, 15, 1953; March, 8 1954.

CASE STATED by the Resident Magistrate sitting at Antrim Petty Sessions.

The Ulster Transport Authority, respondents in this appeal, charged the defendants and appellants with an offence under section 18 (1) of the Transport Act (Northern Ireland), 1948 (1), for that they being a person other than the Authority and without the consent of the Authority and the approval of the Ministry of Commerce for Northern Ireland did use a motor vehicle on the public highway to carry for reward merchandise. The following facts were admitted or proved before the resident magistrate.

A Bedford Scammell motor vehicle, hereinafter called " the lorry ", the property of the defendants and driven by one Peebles, was used to carry merchandise consisting of a load of meal, the property of Agricultural Supplies (Ulster) Ltd., hereinafter called " A.S.L." on the public highway from Muckamore to Belfast. The defendants were carriers entitled to carry for reward within the City of Belfast but not otherwies. The defendants had previously made a contract with

(1) Transport Act (Northern Ireland), 1948, s. 18 :

" (1) Save as provided by the next " succeeding section of this Act, a " person other than the Authority " shall not, except with the consent " in writing of the Authority and " the approval of the Ministry, use " a motor vehicle on a public high- " way to carry for reward any " passengers or any luggage or " merchandise .....

" (2) For the purpose of this and " the next succeeding section....

" (*b*) Where a motor vehicle is being " used on a public highway to " carry for reward any passengers " or any luggage or merchandise " the driver of the vehicle, if it " belongs to him or is in his pos- " session under an agreement for " hire, hire-purchase, credit-sale or " loan, and, in any other case, the " person whose agent or servant the " driver is, shall be deemed to be " the person by whom the vehicle " is being so used (in this section " referred to as ' the carrier ') :

" Provided that where an agree- " ment for the hire of a motor " vehicle which is used to carry " merchandise on a public highway " is accompanied by a transfer to " the person hiring the vehicle of " the services of a driver thereof " the person by whom the vehicle " has been let on hire shall be " deemed to carry such merchandise " for reward."

A.S.L. by correspondence whereby they agreed to let on hire to A.S.L. the lorry complete with a driver and a helper for the sum of £27 per week. Subsequently representatives of the parties met and discussed the legality of the contract in view of the fact that A.S.L. intended to use the lorry outside Belfast, and in consequence a fresh agreement was entered into by which it was agreed that Peebles, the driver of the lorry, and the helper should, if they were agreeable, leave the employment of the defendants and become employed by A.S.L., and that the amount agreed to be paid for the hire of the lorry should thereupon be reduced by the amount of the wages of the driver and the helper. The lorry was being used in accordance with this modified agreement and the driver was in the employment of and acting under the orders and control of A.S.L. on the occasion complained of in the summons.

The resident magistrate held that on the true construction of the proviso to section 18 (2) (*b*) of the Act of 1948 the facts as found established that the defendants had been guilty of the offence charged and he therefore convicted the defendants and imposed a fine, but stated this case for the opinion of the High Court as to whether he was correct in law.

Jones Q.C. and *Lowry* for the appellants contended that the words " accompanied by the transfer of the " services of the driver thereof " used in the proviso to section 18 (2) (*b*) contemplated the case where the owner placed a driver at the disposal of the hirer, but were inappropriate to describe the situation in a case where the driver voluntarily left the employment of the owner, and they relied on the fact that in such a case there was nothing to prevent the hirer from employing the transferred driver for a vehicle other than that which had been hired, or employing some other person to drive the hired lorry. They also argued that the section was a penal enactment and should be construed strictly.

Nicholson Q.C., *Harrison Q.C.* and *Gibson* for the

Authority argued that the words in the proviso were, in their ordinary meaning, appropriate to describe the agreement in question, and that the transaction was within the class which the Legislature had intended to prohibit.

Cur. adv. vult.

BLACK L.J. read the following judgment of the court :

By section 18 (1) of the Transport Act (Northern Ireland), 1948, it is enacted that, subject to certain exceptions set out in section 19 of the Act but not material for the purposes of the present case, a person other than the Ulster Transport Authority shall not, except with the consent in writing of the Authority and the approval of the Ministry of Commerce, use a motor vehicle on the public highway to carry for reward any passengers or any luggage or merchandise.

The present case turns upon the terms of the proviso to section 18 (2) (*b*) of the Act which reads : " Provided " that where an agreement for the hire of a motor " vehicle which is used to carry merchandise on a " public highway is accompanied by a transfer to the " person hiring the vehicle of the services of a driver " thereof, the person by whom the vehicle has been let " on hire shall be deemed to carry such merchandise " for reward ".

The above named defendants were convicted and fined at Antrim Petty Sessions on May 9, 1952, of having on October 8, 1951 used a motor lorry G.Z. 9615 on the public highway to carry merchandise for reward contrary to section 18 (1) of the Act. The lorry had been let on hire by the defendants to a company called Agricultural Supplies (Ulster) Limited, to which I shall refer as " A.S.L.", and was at the time of the alleged offence being driven by a driver called Peebles. The question for this court is whether in the circumstances set out in the case stated the learned resident magistrate was correct in holding that the defendants were to be deemed to be carrying the merchandise contained in the lorry for reward by reason of the proviso to section 18 (2) (*b*) of the Act.

The facts of the case are simple. By a letter dated October 1, 1951, from the defendants to A.S.L. and a reply dated October 2, 1951, from A.S.L. to the defendants, the defendants agreed to supply A.S.L. with a Bedford Scammell lorry complete with driver and helper for a rental of £27 per week commencing on Monday, October 8, 1951. Within a day or two, however, from this exchange of letters it apparently occurred to the defendants that this arrangement was open to the objection that under the terms of the proviso to section 18 (2) (*b*) they would be deemed to be infringing the Act by carrying A.S.L.'s merchandise for reward. Accordingly at an interview on October 3 or 4, between Mr. Ardill of the defendant Company and Mr. Morrison of A.S.L. it was suggested by Mr. Ardill that if Peebles the driver of the lorry was agreeable to do so he could leave the employment of the defendants and enter the employment of A.S.L. Mr. Morrison accepted this suggestion and it was then agreed that the agreement contained in the two letters of October 1 and 2, 1951, should be scrapped except that the sum of £27 mentioned therein should be the basis of A.S.L.'s liability and that A.S.L. should pay the defendants that sum less the wages of the driver of the lorry and the helper, who should also leave the defendants employment and enter the employment of A.S.L. if agreeable to do so. The driver Peebles and the helper on the lorry were both agreeable to this course, and in accordance with the arrangement made at the interview between Mr. Ardill and Mr. Morrison they left the employment of the defendants and on the morning of October 8, at the commencement of working hours they entered the employment of A.S.L. The lorry was on October 8, 1951 hired from the defendants by A.S.L. in accordance with the arrangement made between Mr. Ardill and Mr. Morrison and on that 8th day of October (the date of the alleged offence) Peebles, the driver of the lorry, was at all material times in the employment of and acting under the orders and control of A.S.L. and was not in the employment of or acting under the orders or control of the defendants. The question accordingly is whether

in these circumstances the resident magistrate was correct in taking the view that the agreement for hire of the lorry to A.S.L. was in the words of the proviso to section 18 (2) (*b*) of the Act accompanied by a transfer to A.S.L. of the services of a driver of the lorry.

We have heard most interesting and ingenious argument in which section 18 (2) of the Act of 1948 has been submitted to an analysis and dissection which lacked nothing in thoroughness. The defendants argued that the words " transfer of the services of " a driver " contemplated a case where the owner of the lorry still remained the employer of the driver but entered into an arrangement placing the driver's services for the time being at the disposal of the person hiring the lorry and that they were inappropriate to describe a situation in which the driver had of his own free will left the employment of the owner and had equally voluntarily taken up employment with the hirer. They also contended that the wording " a " transfer of the services of a driver thereof " showed that the Legislature was dealing with a case where the arrangement was that while he was under the orders of the hirer the services of the driver were to be rendered in connection with the particular lorry whereas after Peebles had left the defendants' employment and had entered A.S.L.'s the latter Company could have assigned him to drive any of their lorries and might have entrusted the task of driving the defendants' lorry to some other employee. And finally they submitted that at best there was an ambiguity in the statutory provisions and that therefore the section being a penal one the proviso ought to be construed in favour of the defendants.

It may well be that in framing the proviso the Legislature had primarily in mind the type of arrangement suggested by the defendants. But it seems at least equally possible that they deliberately framed the proviso widely in order that it should be sufficient to cover such an arrangement as that carried out in the present case. The only safe course is to go to the

words of the proviso and read them in their natural meaning. While a transfer of the services of a driver might undoubtedly be carried out in the way suggested by the defendants it seems to us that such a transfer may equally well be effected by an agreement such as that in the present case to which all three parties assent whereby the driver leaves the employment of the owner of the vehicle and enters the employment of the hirer. Using the phraseology of the proviso in its ordinary natural meaning it appears to us quite clear on the facts set out in the case stated that the agreement for the hire of the lorry to A.S.L. was accompanied by a transfer to A.S.L. of the services of Peebles as a driver of the lorry and accordingly we see no escape from the conclusion that the transaction fell within the wording of the proviso. We therefore hold that the learned resident magistrate's decision was correct in law and the question submitted by him for the opinion of this court must be answered accordingly.

Appeal dismissed.

Solicitors for the appellants: *Cleaver, Fulton & Rankin.*

Solicitors for the Authority: *J. D. Coates & Co.*

J.P.

REGINA (JOHN CLARKE & CO., LTD.) v. NORTHERN IRELAND GENERAL HEALTH SERVICES BOARD (1).

Health services—Pharmaceutical services—Chemists' terms of service—Advertising—Health Services Act (Northern Ireland), 1948 (11 & 12 *Geo.* 6, *c.* 3), *ss.* 5, 6, 12, 80—*Health Services (General Medical and Pharmaceutical Services) Regulations (Northern Ireland)*, 1948 (*S.R. & O.* 1948, *No.* 147), *Sch. III, Pt. I—Health Services (General Medical and Pharmaceutical Services) (Amendment) Regulations (Northern Ireland)*, 1948 (*S.R. & O.* 1948, *No.* 260).

Regulations made under the Health Services Act (Northern Ireland), 1948, provide for the terms of service of chemists and suppliers of surgical appliances under that Act. These terms of service contain a provision that a chemist shall not advertise that his name is included in the General Health Services Board's pharmaceutical list or that he provides or is authorised to provide pharmaceutical services under the Act, and the term "advertise" is defined as including (inter alia) the issue of circular letters, the publication of booklets, leaflets and pamphlets, and the publication of a notice in any newspaper.

Complaints were formulated by the General Health Services Board against a company carrying on business as pharmaceutical chemists and suppliers of surgical appliances alleging that in breach of these terms of service they (i) had published or permitted to be published in newspapers a notice containing the words "Appliances supplied under the National Health Act", (ii) had sent or permitted to be sent to a person in Northern Ireland a circular or leaflet containing these words. These complaints were heard by the Services Committee of the Board which decided that the complaints had been proved.

Held, that as the terms of service merely prohibited the publishing of a notice and the sending of circulars, a finding that complaints of publishing or permitting to be published a notice and sending or permitting to be sent a circular had been proved was insufficient to justify the Committee's conclusion that there was a breach of the terms of service.

(1) In the Queen's Bench Division (Crown Side) before Black L.J. and Sheil J.: July 14, 1953: March, 8, 1954.

MOTION to make absolute a conditional order of certiorari. The facts sufficiently appear in the judgment of the court.

Jones Q.C. and *Gibson* for the prosecutor.

Lowry for the Board.

Cur. adv. vult.

BLACK L.J. delivered the following judgment of the court: This matter comes before the court upon the application of John Clarke & Co., Limited, who carry on business in Belfast as pharmaceutical chemists and suppliers of surgical appliances and whom we shall call the applicants, for an order of certiorari to quash (*a*) certain findings and a recommendation of the Services Committee of the Northern Ireland General Health Services Board (whom we shall refer to as the Board) and (*b*) the decision of the Board adopting the recommendation of the Committee. The findings challenged are findings of fact that the applicants published or permitted to be published in the *Belfast News-Letter* and *Belfast Telegraph* advertisements which contained the words "Appliances supplied "under the National Health Service" and that they sent or permitted to be sent a circular or leaflet containing these words to a person resident in Northern Ireland, and an inference drawn by the Committee from these facts that the applicants were in breach of their terms of service. The recommendation which it is sought to have quashed is a recommendation that the sum of £10 be deducted from the applicants' remuneration.

The applicants are included in the lists of chemists and suppliers of appliances maintained by the Board. We shall also have occasion to refer to an English company called Beasley's Limited who are manufacturers of various surgical appliances and are included in the Board's list of suppliers of appliances.

By clause 23 of the Health Services (General Medical and Pharmaceutical Services) Regulations (Northern Ireland), 1948, made under the Health Services Act

(Northern Ireland), 1948, it is provided that the arrangements which the Board are by section 12 of that Act to make for the supply of drugs and medicines and prescribed appliances to persons receiving general medical services shall incorporate the terms of service contained or referred to in Part I of the Third Schedule to the Regulations. By the subsequent Health Services (General Medical and Pharmaceutical Services) (Amendment) Regulations (Northern Ireland), 1948, a paragraph numbered 10 and dealing with advertising was added to Part I of the Third Schedule to the earlier regulations. Sub-paragraph (1) of this paragraph 10 provides that (subject to an exception not material in the present case) a chemist shall not advertise that his name is included in the pharmaceutical list or that he provides or is authorised to provide pharmaceutical services under the Act. And sub-paragraph (3) of paragraph 10 defines the expression " advertise " as including (inter alia) the issue of circular letters, the publication of booklets, leaflets and pamphlets, and the publication of a notice in any newspaper. It is conceded that at all material times the applicants were bound by these terms of service.

On July 17, 1952, an advertisement appeared in the *Belfast News-Letter* headed " Beasley's Rupture " Experts are coming here " and stating that Beasley's Limited... announce that they will be making a special fitting visit by their representative in co-operation with John Clarke & Co., Ltd. (the present applicants) at 8, Donegall Square West, Belfast. This address is the shop in which the applicants carry on their business. The advertisement continued " Appliances supplied " under the National Health Service ". And it concluded with the words " If unable to call, write for " details of our 10 days' free trial offer to John Clarke " & Co., Ltd., Dept V., 8 Donegall Square West, " Belfast. Tel. 27256 ". On the 18th July a similarly worded advertisement appeared in the *Belfast Telegraph*. About the same time Beasley's Limited circularised a number of their customers advising them

of the intended visit by their surgical fitter " to their " Belfast agents Messrs. John Clarke & Co., Ltd., " 8 Donegall Square West, Belfast." This circular also contained the notification " Appliances supplied " under the National Health Service ". There can be no doubt that the publication of these advertisements in the *Belfast News-Letter* and the *Belfast Telegraph* constituted advertising within the meaning of paragraph 10 of Part I of the Third Schedule to the Regulations of 1948 on the part of whoever was responsible for publishing them, and that the issue of the circular likewise constituted advertising within the meaning of paragraph 10 on the part of whoever was responsible for issuing it.

The Board were not slow to take up the matter. On July 18, 1952, the Secretary of the Board wrote to the applicants informing them that it had come to the notice of the Board that an advertisement for Beasley's Hernia Appliances had appeared under the applicants' name in the *Belfast News-Letter* dated July 17, 1952, and that it contained the words " Appliances supplied " under the National Health Service ". The letter went on to request the applicants' observations in view of Article 10 of Part I of the Third Schedule to the General Medical and Pharmaceutical Services Regulations which precludes a contractor from advertising that he provides services under the Act. The applicants replied by letter of July 21, 1952, stating that the advertisement referred to in the letter of July 18, was drafted by Messrs. Beasley's Limited and that owing to shortage of time there was no opportunity for consultation with the applicants before the advertisement was issued. On August 1, 1952, a further letter was written by the Secretary of the Board to the applicants with references to the circular issued by Beasley's Limited and requesting the applicants' observations. The applicants replied by letter dated August 12, 1952, stating that the circular was drafted by Messrs. Beasley's Limited and that owing to shortage of time there was no opportunity

for consultation with the applicants before the circular was issued.

In the meantime the applicants had sent the Board's letter of July 18, 1952 to Beasley's Limited, and on July 24, that company wrote to the Board an argumentative and not very sagacious letter seeking to justify on various grounds the advertisement which had been inserted in the newspapers and contending (inter alia) that the statement " Appliances supplied " under the National Health Service " was not an advertisement. In the forefront however of the letter they stated that the advertisement was inserted by themselves and not by the applicants.

The next step was that the Board formulated two complaints against the applicants. The first was that they were in breach of their terms of service by publishing or by permitting to be published on July 17, 1952, in the *Belfast News-Letter* and on July 18, 1952, in the *Belfast Telegraph* advertisements which contained the words " Appliances supplied under the National Health " Service." The second was they they were in breach of article 10 in that they sent or permitted to be sent to a person resident in Northern Ireland a circular letter or leaflet containing the words " Appliances " supplied under the National Health Service ". The Board also formulated a complaint against Beasley's Limited that they were in breach of article 10 in that they sent to a person resident in Northern Ireland a circular letter or leaflet containing the words " Appli- " ances supplied under the National Health Service ".

These complaints eventually came on for hearing before the Services Committee of the Board on November 12, 1952. On the complaints against the applicants, Messrs. G. Brittain and D. O. Pinkerton, who we understand are directors of the company, appeared as representing it.

On the complaint against Beasley's Limited no director or other officer of that company was present, but Messrs. Brittain and Pinkerton attended on Beasley's Limited's behalf. In a letter to the Board dated October 8, 1952, stating that they hoped to be

represented by the applicants, Beasley's Limited reiterated that the responsibility for issuing the circular and advertisement complained of was entirely their own.

After hearing Mr. Brittain, who appears to have acted as spokesman, the Committee found that the applicants had published or permitted to be published on July 17, 1952, in the *Belfast News-Letter* and on July 18, 1952, in the *Belfast Telegraph* advertisements which contained the words "Appliances supplied "under the National Health Service" and that they sent, or permitted to be sent, to a person resident in Northern Ireland, a circular or leaflet containing the words "Appliances supplied under the National Health "Service". The Committee considered that the inference to be drawn from these facts was that the applicants were in breach of their terms of service and recommended that the sum of £10 be deducted from their remuneration. On the complaint against Beasley's Limited for whom Mr. Brittain also acted as spokesman the Committee found that they had sent to a person in Northern Ireland a circular letter or leaflet containing the words "Appliances supplied "under the National Health Service" and recommended that the sum of £10 be recovered from that company. These recommendations were adopted by the Board at their meeting on November 25, 1952

There is an acute conflict of evidence as to what exactly happened on the hearing of the complaints. The minutes of the Committee state that on the hearing of the complaints against the applicants Mr. Brittain agreed that the Regulations had been contravened and that he accepted responsibility for Beasley's Limited's action. Mr. Brittain in his affidavit denies that he agreed at any time that the regulations had been contravened or that he accepted responsibility for Beasley's Limited whereas Mr. Stewart, the Secretary of the Board, and Mrs. Armour, one of its members, depose to the accuracy of the statements in the minutes. Fortunately we do not find it necessary to resolve this disagreement. We are sure all the parties are endeavouring to give an accurate account of what took

place. Mr. Brittain had a difficult task in appearing both as a witness and as an advocate on behalf of his own company and also as an advocate on behalf of Beasley's Limited. On behalf of his own company the case which he was primarily concerned to make was that they were not aware of the contents of the advertisement before it appeared in the newspapers, and did not know that it would contain the words complained of, and similarly that they were not aware that a circular was being issued in the terms of Beasley's Limited's circular and (according to the minutes) that if they had been aware of the wording beforehand they would have had it put right. On behalf, however, of Beasley's Limited Mr. Brittain had a different and more difficult task. He had on their behalf to concede the issue of the circular, and the only case which he could possibly put forward as their advocate was to try to urge upon the Committee arguments justifying the circular on the lines of the contentions contained in Beasley's Limited's letter of July 24, 1952. We think it is quite possible that Mr. Brittain may have allowed himself to stray into these contentions when putting the case on behalf of his own company and may have conveyed to the Committee that the applicants were prepared to stand over the contents of the advertisement and the circular. It may well be that in his zeal he used at some stage the phrase that he accepted responsibility for Beasley's Limited's actions. But whether or not he conveyed to the Committee that the applicants approved and were prepared to defend the wording of the advertisement and the circular the whole tenor of his contention, to which he obviously steadfastly adhered, that the applicants were quite unaware that the advertisement and the circular would contain the objectionable announcement, is wholly inconsistent with an admission that the applicants were responsible for the publication of that announcement. If, in fact, Mr. Brittain said something which could be construed as such an admission, all the probabilities would appear to be either that by some slip he used an expression which entirely misrepresented the position as he was

asserting it or else that he simply did not appreciate the meaning of the term " responsible ". In view of all the other facts of the case, if the Committee based their findings on such an alleged acceptance of responsibility by Mr. Brittain we should feel that they had based them on a very unsatisfactory foundation.

There is, however, another and a wider ground upon which the Committee's decisions and recommendation must be set aside. The term of service set out in subparagraph (1) of paragraph 10 of Part I of the Third Schedule to the Regulations of 1948 is that the chemist shall not advertise that his name is included in the pharmaceutical list or that he provides or is authorised to provide pharmaceutical services under the Act. By subparagraph (3) of paragraph 10 the expression " advertise " is defined as including the issue of circular letters and the publication of a notice in any newspaper. The officer of the Board who drafted the charges which were laid against the applicants had presumably before him the applicants' letters of July 21 and August 12, 1952, and Beasley's Limited's letter of July 24, 1952, and pretty clearly doubted whether it could be established that the applicants had either issued a circular letter or had published notices in newspapers. Accordingly he framed the charges to read that the applicants were in breach of their terms of service in that they published or *permitted to be published* the advertisements in the newspapers and that they sent or *permitted to be sent* to a person resident in Northern Ireland the circular or leaflet. And after their investigation the findings at which the Committee arrived were that the applicants had published or permitted to be published the advertisements and had sent or permitted to be sent the circular or leaflet. Now it is significant that subparagraph (2) of paragraph 10 when defining advertising as including the issue of circular letters and the publication of notices in newspapers does not in terms extend the definition to include *permitting* the issue of circular letters or *permitting* the publication of notices in newspapers. When we have a definition of advertising for the purposes of paragraph 10, and that definition

confines itself to mentioning that the term shall include a number of positive acts such as issuing circular letters and publishing notices in newspapers, it seems to us an unwarranted widening of the definition to treat the term as including in addition the mere permitting of the doing by some other party of those acts especially in a paragraph which entails the possibility of penal consequences being visited upon the person guilty of the conduct forbidden by the paragraph. Accordingly, the allegations contained in the charge against the applicants that they published the notices in the newspapers or permitted them to be published and that they issued the circular or permitted it to be issued are allegations of conduct which may or may not have constituted a breach of paragraph 10, and it follows that the findings of the Committee that the applicants published the newspaper notices or permitted them to be published and that they issued the circular or permitted it to be issued were not sufficient to justify the conclusion that the applicants had been guilty of conduct amounting to a breach of the paragraph and a conclusion based on such findings cannot be allowed to stand. Mr. Lowry conceded that the determinations of the Committee and the Board are determinations which are reviewable on certiorari. An order will therefore be made in the terms of the notice of motion.

In view of the conclusion at which we have arrived it has not been necessary to consider whether this court would be entitled to investigate if there was any evidence before the Committee to justify a finding that the applicants had permitted the publication of the notices in the newspapers or the issue of the circular. If the evidence was accepted that the applicants were quite unaware that the newspaper notices or the circular would contain the offending phrase it is hard to see how the applicants could be

held to have permitted the publication of the notices or the issue of the circular.

Order absolute.

Solicitors for the prosecutor : *J. C. Taylor & Co.*

Solicitors for the Board : *Johns, Elliott, Wallace & Co.*

J.P

C. & E. LEWIS LTD. v. GRIBBEN (1).

Practice—Execution—Garnishee order—Judgment against personal representative—Money due to estate of deceased—Debt "owing or accruing"—Money held on deposit receipt—R.S.C. Or. 45, *r.* 1.

A garnishee order may be made to attach money due to the estate of a deceased person in favour of a creditor of the deceased who has obtained judgment against the personal representative as such.

Moneys held by a bank upon deposit receipt on terms that specified notice of withdrawal must be given and that the receipt must be produced for discharge at the time of payment is not a debt "owing or accruing" until such terms have been complied with and is accordingly not attachable by a garnishee order.

MOTION to make absolute a conditional order of garnishee.

The facts and arguments of counsel in this case appear sufficiently from the judgment.

Gibson for the plaintiffs.

Pringle for the defendant.

Reid for the Bank.

Cur. adv. vult.

PORTER L.J.: The defendant is the administrator of Mary Ann Gribben, late of Magheralane in the County of Antrim, spinster, who died intestate on November 11, 1951. Letters of administration of her estate were granted to the defendant on June 30, 1952. The deceased had carried on the business of a boot and shoe merchant in High Street, Antrim, the shop and premises being held by her under a fee farm grant, and at the time of her death she owed the Belfast Bank a sum of £680 which was secured by a deposit of the title deeds of the shop. She was also indebted to various creditors in considerable sums of money for goods sold and delivered, and her sister

(1) In the Queen's Bench Division before Porter L.J.: April 23, May 3, 1954.

Bridget Gribben claimed to be a creditor for £995 made up of two sums alleged to have been advanced to the deceased during her lifetime.

On December 22, 1953, James Gribben as administrator of the estate of Mary Ann Gribben caused a writ of summons to be issued against Henry Gribben and Bridget Gribben for the administration of the real and personal estate of the deceased, Henry Gribben being sued as the lawful nephew and heir-at-law of the deceased and Bridget Gribben as an alleged creditor of the estate of the deceased.

The writ of summons in the present action was issued on February 17, 1954, for goods sold and delivered by the plaintiffs to the deceased Mary Ann Gribben and due by a settled account, and by a judgment dated March 6, 1954, it was adjudged that the plaintiffs should recover against the defendant as administrator of the estate of Mary Ann Gribben the sum of £254 17*s.* 11*d.* and £9 14*s.* 8*d.* for costs. The said judgment was entered in pursuance of a consent signed by the solicitors for the defendant.

By a garnishee order dated March 19, 1954, after reciting that the Northern Bank Ltd. was indebted to the defendant as administrator of the estate of Mary Ann Gribben deceased in a sum of £2,000 or thereabouts, being on deposit in the said Bank, it was ordered that out of the said sum of £2,000 or thereabouts so due to the defendant as aforesaid the sum of £264 12*s.* 7*d.* be and the same was thereby attached without further notice, and it was further ordered that the said Bank appear at the time and place therein mentioned if they should desire to show cause why they should not pay the said sum of £264 12*s.* 7*d.* the amount of the said judgment including costs to the plaintiffs.

The said sum of £2,000 or thereabouts which represents the proceeds of the sale of portions of the estate of Mary Ann Gribben deceased was lodged by the defendant as administrator of the said estate on two deposit receipts, one for £1,700 and the other for £309 7*s.* 7*d.*, in the Randalstown branch of the said

Bank and the terms of the withdrawal of the amount so lodged are that ten days' notice of the withdrawal must be given by the depositor to the Bank and that the receipt must be produced and discharged when payment of either principal or interest is required and that the said deposit receipt is not transferable.

Mr. Gibson appeared for the plaintiffs in support of the order. Mr. Reid appeared for the Bank and said that the Bank would abide any order made by the court and he took no further part in the case. Mr. Pringle appeared for the defendant who had been served with the order, and shewed cause why the order should not be made absolute. He based his case upon two grounds—(1) that the money was portion of the personal estate of Mary Ann Gribben and was held on trust, and (2) that the money lodged on deposit was not a debt " owing or accruing to the " defendant ".

The first contention raises the question whether monies belonging to an estate can be attached by a garnishee order obtained by a judgment creditor A, whose judgment is against B. as personal representative. If the judgment is against B. personally, the money could not be garnisheed, for B.'s personal debt cannot be payable out of the monies of the estate. But where the judgment is against B. as personal representative, there appears to be no reason why money of the estate in the hands of a third party should not be attached in a proper case—that is to say, if the money is a debt due to the personal representative. In Rolle's Abridgment, tit. Customs of London, Kl. 2., it is said that a debt due to an administrator may be attached.

In *Burton v. Roberts* (1), the matter came before a court consisting of Bramwell and Martin BB., and it was held that where judgment is recovered against an executor, a debt due from a third person to the testator's estate may be attached by an order of garnishee. In that case a decree for the administration of the estate had been made before the judgment was obtained against the executor, and it was argued that if the order was made absolute it would

(1) (1860) 6 H. & N. 93.

disturb the due administration of the testator's assets. The court held against this contention and made the order absolute. It follows a fortiori that the mere issue of a writ of administration of the estate before the creditor has obtained his judgment would not defeat an application by the judgment creditor to attach the trust money. See also *Fowler v. Roberts* (1).

In *Morton v. Mahon* (2), the Court of Exchequer granted a conditional order to attach a debt due to the personal representative of a deceased judgment debtor, but the report does not say whether the order was made absolute.

In my opinion the first contention of Mr. Pringle must fail. The main objection urged by him is that the money held by the Northern Bank Limited on deposit receipt was not a debt "owing or accruing" to the judgment debtor James Gribben.

There are several Irish decisions in which the question was raised but not settled. Palles C.B. made a conditional order in *Barrett v. McCarthy* (3), but he is reported as saying: "I am not to be taken as deciding "that a sum of money on deposit receipt is capable "of attachment," but as the Bank had not appeared to raise the point he made the order.

In *Reidy v. Casey* (4) the court (Lawson and Harrison JJ.) granted a conditional order, and in *Smith v. Sexton* (5), the court (Lawson and Johnson JJ.) made a conditional order absolute. Affidavits had been filed by the defendant shewing cause, but there was no appearance for the defendant or the garnishees who were the liquidators of the Munster Bank Ltd. (in liquidation).

I have already stated that it was a term of the contract under which the money was lodged with the Bank that ten days' notice previous to the withdrawal of the money must be given by the depositor to the Bank. If such notice has not been given at the time of the *service* of the order, the money on deposit is not

(1) (1860) 2 Giff. 226.
(2) (1856) 6 I.C.L.R. 131.
(3) (1879) 13 I.L.T. 375.
(4) (1882) 16 I.L.T.R. 93
(5) (1886) 20 I.L.T.R. 75.

affected by the order, because at that time it is not a debt due for which the depositor could have immediately and effectually sued. Moreover payment cannot be required unless and until the receipt is produced and discharged.

Mr. Gibson for the plaintiffs argued that in Ireland money held on deposit receipt by a bank is attachable, that even in cases where ten days' notice of withdrawal is required, no such notice is necessary when the order nisi is served because the order nisi amounts to a demand, and since the Bank had raised no objection to the order it should be made absolute. He referred to *Rogers v. Whiteley* (1), an action against the plaintiffs' banker for having wrongfully refused to honour cheques drawn on him by the plaintiffs. A judgment creditor of the plaintiffs' had obtained a garnishee order nisi that all debts owing or accruing due from the defendant to the plaintiffs be attached to answer the sum of £6,000. There was then standing to the credit of the plaintiffs at the defendant's bank a balance of over £6,800 on a current account and on a deposit account taken together. The order gave the plaintiffs notice to attend at chambers on an application by the judgment creditor "that the garnishee "pay the debt due from him to the judgment creditor "or so much thereof as may be sufficient to satisfy "the judgment." In consequence of this order the defendant refused to honour cheques drawn by the plaintiffs upon the balance between £6,000 and the amount standing to plaintiffs' credit at the defendant's bank.

Mr. Gibson relied on this case as shewing that money lodged on deposit receipt was attachable by a garnishee order. On looking into the facts of the case as reported in the Court of Appeal I find that the plaintiffs had two accounts with the defendant, (*a*) a deposit account in which there was over £6,800 to plaintiffs' credit, and (*b*) a current account in which there was about £60 or £70. But it should be observed that notice had been given to transfer the former to the

(1) [1892] A.C. 118.

current account, and that notice had expired so that the plaintiffs were entitled to draw on the two accounts : see the judgment of Lindley L.J. (1).

Mr. Gibson's point therefore is of no avail.

A recent case in the English Court of Appeal –*Bagley v. Winsome and National Provinical Bank Ltd.* (2) – shows that there is no debt owing or accruing to the judgment debtor unless and until he has complied with the terms upon which the Bank has accepted the money on deposit. The customer in that case had a deposit book, and it was a term of the contract that " personal application must be made and this book " produced to the bank when any money is withdrawn " and all withdrawals are subject to fourteen days' " notice." The judgment debtor (the customer) gave due notice to the Bank and that notice took effect on January 11, 1952. On that date the judgment creditor took out a garnishee summons which was heard January 29, 1952. It was held that it was a condition precedent to the money being withdrawn that the depositor should attend personally and produce his deposit book to the Bank, and as this condition had not been satisfied there was no debt owing or accruing to the judgment debtor by the bank and the money on deposit could not be attached.

Evershed M.R., referring to *Joachimson v. Swiss Bank Corporation* (3) in which the court held that the service of the garnishee summons should be taken to operate as a demand, said that a mere demand differed from a personal application with the production of the deposit book, and he pointed out that in that case the Court was dealing with money on a current account (4). As Hodson L.J. said : (5) " The authorities stop short " of supporting the view that the contract between " the customer and the bank should be treated as per- " formed by the issue of the garnishee order where the " step required by the contract, viz., the production

(1) (1889) 23 Q.B .D. 236,237
(2) [1952] 2 Q.B. 236.
(3) [1921] 3 K.B. 110.
(4) [1952] 2 Q.B. at 240.
(5) Ibid 246.

" of the book, has not been taken. " (See also Paget on Banking, 5th Ed. p. 92).

In my opinion there is no debt owing or accruing from the Bank to the judgment debtor. The two conditions precedent of the contract, viz., ten days' notice of withdrawal and the production and discharge of the receipt, have not been saitsfied and therefore garnishee proceedings will not lie against the money on deposit in the Bank.

The order will be—allow the cause shewn, discharge the conditional order, the plaintiffs to pay to the defendant the costs of and incidental to these proceedings.

Conditional order discharged.

Solicitors for the plaintiffs : *Shean & Dickson.*

Solicitors for the defendant : *John P. McCann & Sons.*

Solicitor for the Bank : *Henry J. M. Wilson.*

J P.

MINISTER OF AGRICULTURE v. NUGENT (1).

Emergency legislation—Agriculture—Importation of livestock—Seizure by authorised officer—Sale otherwise than by seizing officer—Forfeiture of proceeds of sale—Agriculture (Miscellaneous War Provisions) Act, 1940 (3 & 4 *Geo.* 6, *c.* 14), *s.* 28—*Livestock (Import from Eire and the Isle of Man) Regulations*, 1945 (*S.R. & O.* 1945, *No.* 942), *reg.* 5.

Regulation 5 (2) of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, made under section 28 of the Agriculture (Miscellaneous War Provisions) Act, 1940, provides that an authorised officer who suspects that livestock has been imported in contravention of the Regulations "may, subject to any directions "... given him by the appropriate Minister, seize that livestock and "may sell it at any time after the seizure". Regulation 5 (4) provides for the bringing of condemnation proceedings at petty sessions by the appropriate Minister for the forfeiture of the livestock seized "or the proceeds of the sale thereof, as the case may be."

An authorised officer seized bullocks which he suspected had been illegally imported but he did not personally sell them nor did he authorise any person to sell them on his behalf. The bullocks were in fact sold by an auctioneer acting on behalf of the Ministry of Agriculture for Northern Ireland before any condemnation proceedings had been taken. The Minister of Agriculture for Northern Ireland subsequently brought proceedings at petty sessions for the forfeiture of the proceeds of this sale of the bullocks but the resident magistrate refused to make a forfeiture order and dismissed the summons.

Held, that the words "or the proceeds of sale thereof as the "case may be" in regulation 5 (4) referred only to the proceeds of such a sale as was authorised by the Regulations, that is a sale by a seizing officer, and that there was no power to condemn the proceeds of a sale made by any other person.

CASE STATED by the Resident Magistrate sitting at Keady Petty Sessions.

The respondent was summoned to appear at petty sessions to show cause why a forfeiture order should not be made condemning the proceeds of sale of certain bullocks which had been seized by an authorised officer who suspected them to have been imported contrary to the provisions of the Agriculture (Miscellaneous War Provisions) Act 1940, and the Live-

(1) In the Queen's Bench Division before Lord MacDermott L.C.J. and Black L.J.: March 16, May 17, 1954.

stock (Import from Eire and the Isle of Man) Regulations, 1945, made thereunder.

At the first hearing of the summons the following facts were proved or admitted :

(1) that the bullocks referred to in the summons had been seized by an authorised officer, a sergeant of the Royal Ulster Constabulary, and that he had reason to suspect that they had been imported contrary to the Regulations.

(2) that he did not personally sell the bullocks, nor did he give any authorisation, direction or instruction for, regarding or in relation to their sale.

(3) that after the seizure the sergeant gave the prescribed notice of seizure, and the respondent duly claimed the bullocks.

(4) that the sergeant handed the bullocks over to a veterinary surgeon employed by the Ministry of Agriculture for Northern Ireland.

(5) that the sergeant knew nothing at any time material to the case of or concerning the sale of the bullocks or the circumstances under which they were sold.

(6) that the bullocks were in fact sold by auction on behalf of the Ministry as the property of the Ministry and as home bred cattle, but without any warranty.

(7) that at the time of the sale no forfeiture order had been made in respect of the bullocks.

The resident magistrate adjourned the hearing of the summons for the production of further evidence, and at the adjourned hearing the following further facts were proved :

(8) that in 1950 the Ministry of Agriculture issued a general instruction to the Royal Ulster Constabulary that animals seized under the Regulations were thereafter to be sent to a named veterinary surgeon in the employment of the Ministry who would arrange for their sale by public auction.

(9) that this instruction was not issued to the sergeant or any particular person concerned in this case.

(10) that it was prepared by officials of the Ministry without instructions from or consultation with the Minister himself.

(11) that the veterinary surgeon named in the instructions of 1950 was not the one to whom the bullocks had been handed over in this case.

It was contended for the respondent that the statutory provisions relating to the seizure and disposal of animals were penal and should be strictly complied with, and that they had not been complied with strictly or at all; that the instruction issued by the Ministry was not in accordance with the Regulations, and in any event had not been complied with; that the Regulations authorised the Minister to give directions as to the seizure of animals but not as to their sale. It was further submitted that the Minister was estopped from alleging that the bullocks had been imported by reason of the fact that the Ministry had sold them as home bred.

It was contended for the Minister that the instruction of the Ministry was a direction by the Minister as to the disposal of the bullocks and was in accordance with the Regulations.

The resident magistrate, after adjourning the case for further consideration, decided that the requirements of the Regulations had not been complied with, refused to make the order sought and dismissed the summons. On the application of the Minister he stated this case for the opinion of the High Court as to whether he had been right in so holding.

Nicholson Q.C. and *Lowry* for the Minister.

Jones Q.C. and *Bready* for the respondent.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: I will ask Lord Justice Black to deliver the first judgment.

BLACK L.J.: The various statutory orders which have been made in regard to the import of livestock from Eire have always contained a provision that animals imported in contravention of the regulations contained in the order shall be forfeited. Each of the orders prescribes the procedure to be adopted in order to determine whether animals suspected to have been so imported are, in fact, liable to forfeiture. The provisions contained in the orders regarding such procedure follow the same broad pattern as, and are obviously modelled upon, the analogous provisions in the Customs Acts. In their details, however, these orders, and particularly the Regulations of 1945 with which the present case is concerned, differ in some important respects from the corresponding Customs Acts provisions, but in order to appreciate these differences and to understand the precise effect of the Regulations of 1945, I think it is of assistance to consider first the procedure prescribed by the Customs Acts, and then to note the alterations in this procedure made by the framers of the 1945 Regulations.

The procedure under the Customs Acts is now set out in the Seventh Schedule to the Customs and Excise Act, 1952, but at the time of the making of the Regulations of 1945 the governing section was section 207 of the Customs Laws Consolidation Act, 1876. To summarise the provisions of that section, it directed that when a seizure was made of any articles alleged to be forfeited the seizing officer should give notice in writing to the owner, that all seizures should be deemed to be condemned unless a claim was made within one week, and that if such a claim was made proceedings should thereupon be instituted in the courts for the forfeiture and condemnation of the articles seized. And the section concludes, "but if any things so "seized shall be of a perishable nature, or consist of "horses or other animals, the same may by direction "of the Commissioners of Customs be sold, and the "proceeds thereof retained to abide the result of any "claim that may legally be made in respect thereof". I think these words are of considerable importance.

They show that no general power was to be inferred in the Commissioners or in any official to dispose of articles seized until the question of whether they were liable to forfeiture had been judicially decided. Such power to sell in the meantime as was given by the statute was recognised as an exceptional power and was strictly limited. It only extended to animals and perishable goods. And it could only be exercised under the direction of the Commissioners of Customs. It is further to be noticed that if animals or perishable goods had been sold under the power conferred by the concluding words of section 207 the appropriate application to the court under the terms of the section would still be for the forfeiture and condemnation of the animals or goods themselves, and not of the moneys representing the proceeds of their sale.

The next enactment to which reference can, I think, be usefully made is the Cattle (Import from Eire) Order, 1938, (S.R. & O. 1938, No. 515). By paragraph 4 (1) of that Order it was provided that if an authorised officer had reason to suspect that any bovine animal had been imported in contravention of the Order he might, subject to any directions given to him by the appropriate Minister, seize and sell it. And by paragraph 4 (2) it was enacted that the appropriate Minister should, as soon as practicable, apply to the court of summary jurisdiction within whose jurisdiction the place at which the bovine animal was seized is situate for an order condemning the bovine animal.

From the wording of this Order it is clear that the only person upon whom the Order expressly professed to confer any authority to sell an animal which had been seized was the authorised officer who seized it. No doubt he might avail himself of the services of an auctioneer or other agent for the purposes of the sale. But it is he who is charged with the responsibility of selling. The Order confers no power of sale upon any government department in the way in which the corresponding provisions of the Act of 1876 conferred the power upon the Commissioners of Customs. It confers no power of sale upon the Minister or upon any

official other than the seizing officer. One naturally enquires why this should be the case. Possibly the clue is to be found in the wording of the Order which enacts that the authorised officer may " seize and sell " the animal. This phraseology appears to contemplate that a seized animal will not be retained unsold. If the framers of the Order had in mind that animals seized would be sold forthwith, or as soon as might be, it was not unnatural that they should use words conferring upon the seizing officer the power of selling, without thinking it necessary to confer such a power upon any other official as well.

Before leaving this Order of 1938 it is to be noticed that although it contemplates that an animal which has been seized will have been sold, nevertheless the application to the court under the Order will, just as under the Customs Acts, be an application for an order condemning the animal itself, and not for one condemning the proceeds of the sale.

Next came the Livestock (Import from Eire and the Isle of Man) Regulations, 1940, (S.R. & O. 1940, No. 1500). These were the Regulations which were supplanted by the Regulations of 1945. Paragraph 5 (1) of these Regulations of 1940 in terms similar to paragraph 4 (1) of the Order of 1938 provided that if an authorised officer had reason to suspect that any livestock had been imported in contravention of the Regulations he might, subject to any directions given to him by the appropriate Minister, seize and sell such livestock. Here again it appears to be contemplated that all livestock seized will be sold. And again the only person given any authority to sell is the seizing officer. Then when one comes to sub-paragraphs (3) and (4) of paragraph 5 of these Regulations of 1940 it is again clear that although the animals seized will in the ordinary course have been sold, the application to the court is to be for an order condemning the animals, and the order made by the court, if it decides against the claimant, is to be an order condemning the animals themselves and not the proceeds of their sale.

The Regulations of 1940 were revoked and superseded by the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, which are the Regulations with which the present case is concerned. Paragraph 5 (1) of these Regulations enacts that any livestock imported or brought into the United Kingdom from Eire or the Isle of Man, or otherwise dealt with in contravention of the Regulations, shall be forfeited. The procedure to be adopted when any livestock is seized on suspicion of having been imported or dealt with in contravention of the Regulations is set out in the subsequent sub-paragraphs of paragraph 5. The wording of these sub-paragraphs has been altered somewhat from the wording of the similar portions of the earlier orders, and while the general outlines of the procedure remain as before, the altered wording has introduced a number of changes which cannot be disregarded, and are, in my opinion, of significance for the purposes of the present case.

Sub-paragraph (2) of paragraph 5 enacts that if an authorised officer has reason to suspect that any livestock has been imported or brought into the United Kingdom or otherwise dealt with in contravention of the Regulations he may, subject to any directions which may be given to him by the appropriate Minister, seize that livestock and may sell it at any time after the seizure, whether an order condemning the livestock as forfeited shall have been made pursuant to the Regulations at the time of sale or not. Here, as in the previous Orders, the only person upon whom any power of sale is conferred is the seizing officer. Neither the Minister himself nor any official other than the actual seizing officer is given any power to sell the livestock while the question whether it has been forfeited is in abeyance. A sale of the livestock by the Minister or by any official other than the officer who effected the seizure could confer no title upon the purchaser if it is eventually decided by the court that the livestock had not in fact become forfeited. This sub-paragraph (2), however, departs in one respect from the wording of the corresponding paragraph of the previous orders. Instead of enacting that the seizing

officer may " seize and sell " livestock suspected of having been imported or otherwise dealt with in contravention of the Regulations, it provides that he may seize such livestock " and may sell it " at any time after the seizure. Reading this new wording in its ordinary grammatical sense the effect of the alteration is that any livestock which has been seized is not necessarily to be sold as of course. It may either be sold by the seizing officer or it may be retained unsold. And it will be found that the later provisions of paragraph 5 are so worded that a clear distinction is drawn between the case where the livestock has been retained unsold and the case where the seizing officer has sold it.

Sub-paragraph (3) of paragraph 5 provides that upon the seizure of any livestock under sub-paragraph (2) the seizing officer shall display a seizure notice. Then comes sub-paragraph (4) which enacts that every animal so seized, or the proceeds of sale thereof, as the case may be, shall be forfeited unless a claimant gives notice in writing that he claims that the animal was at the time of seizure his property, and that it was not imported or brought into the United Kingdom from Eire or the Isle of Man, or that it was not so imported or brought in or dealt with in contravention of the Regulations, whereupon the appropriate Minister shall, as soon as practicable, apply to a court of summary jurisdiction for an order that the animal, or the proceeds of sale thereof, as the case may be, be forfeited.

The only sale referred to in the preceding part of paragraph 5, and indeed the only sale authorised by the Order pending a judicial determination as to whether or not the livestock has been illegally imported or dealt with, is a sale by the seizing officer. Accordingly when the opening words of sub-paragraph (4) refer to " every animal so seized or the proceeds of sale thereof as the case may be ", the natural and indeed inevitable meaning of this phrase " or the proceeds " of sale thereof as the case may be " appears to me to be the proceeds of a sale such as paragraph 5 has been

dealing with, namely where a sale has been effected by the seizing officer under the power conferred upon him by sub-paragraph (2). I think sub-paragraph (4) must be taken as contemplating and dealing with circumstances where what has been done has been done in accordance with the earlier provisions of the Order. Similarly, when the later part of sub-paragraph (4) directs that the Minister shall apply to the court of summary jurisdiction for an order that the animal, or the proceeds of sale thereof as the case may be, be forfeited, I think the phrase " the proceeds of " sale thereof " still refers to the proceeds of a sale by the seizing officer, the only type of sale contemplated by the preceding provisions of the paragraph. So, in the proviso to sub-paragraph (4) I am of opinion that the natural meaning of the phrase " the proceeds of the sale of the animal " remains the same, and refers to the proceeds of a sale authorised under sub-paragraph (2). I do not think that this view of the meaning of the term " proceeds of sale " in sub-paragraph (2) is in any way weakened by the use of the term in what may be a wider sense in sub-paragraph (6) which provides that when a forfeiture order has been made in respect of any livestock or, as the case may be, the proceeds of sale thereof, or where the livestock or the proceeds of sale thereof as the case may be, has otherwise been forfeited, the appropriate Minister shall pay the proceeds of sale of the animal into the Exchequer. This sub-paragraph is not dealing with the time when the matter is still sub judice, and the question whether the livestock has been forfeited or not has still to be determined by the courts. It is dealing with the case where it has been finally settled that the livestock has been forfeited. In such a case the Minister will clearly be entitled to sell the livestock by such agency as he pleases if it has not already been sold, and in the ordinary course he will do so and he will pay into the Exchequer the proceeds of sale of the animal however and whenever the sale may have been effected.

Coming back now to sub-paragraph (4) of paragraph 5 it is directed that after a claim in accordance

with the sub-paragraph has been made the Minister shall, as soon as practicable, apply to the court of summary jurisdiction for an order that the animal, or the proceeds of sale thereof, as the case may be, be forfeited. I cannot disregard the words " as the case " may be " as meaningless. Like Morris J. when confronted with the same form of words in *Bluston & Bramley Ltd. v. Leigh* (1), I must endeavour to give a reasonable and fair meaning to the words in their context. The only effect which I can attach to these words " as the case may be " is that they postulate two distinct and separate cases and indicate that a different application must be made according to the nature of the particular case. If the animal has not been sold by the seizing officer under the provisions of sub-paragraph (2) the application which the Minister must make will be for the forfeiture of the animal itself, whereas if the animal has been sold by the seizing officer the application which he must make will be for the forfeiture of the proceeds of the sale. That some importance was attached to this distinction by the framers of the Order is shown by the fact that they deliberately departed from the procedure under the Customs Acts, and under the Orders of 1938 and 1940 where the application to the court was to be simply for the condemnation of the animal itself as forfeited whether it had been sold or not. If my view as to the effect of the words " as the case may be " is correct, it will not do to bring an application under these Regulations of 1945 for forfeiture of an animal itself if it has been sold by the seizing officer, or for forfeiture of the proceeds of sale if he has not sold it.

In the present case according to the facts set out in the case stated the seizing officer did not personally sell the animals, nor did he give any authorisation or directions or instructions whatsoever for or in relation to their sale ; he knew nothing at any material time of or concerning the sale of the animals and was wholly unaware of the conditions under which they were sold

(1) [1950] 2 K.B. 548, 557.

or by whom they were sold, or of any other facts or circumstances relating to their sale ; they were in fact sold on behalf of the Ministry of Agriculture for Northern Ireland as being the property of that Ministry.

As I have pointed out the Customs Acts and the various Orders regulating the importation of live-stock into the United Kingdom do not purport to confer any power upon government departments generally to sell a subject's property which is suspected of having been illegally imported while the question whether it has been illegally imported or not has still to be decided by the courts. The Acts and Orders are careful to specify the department or the person by whom any such sale may be legally effected. In the present case the only person upon whom the Order of 1945 confers any power of sale is the seizing officer. If either the Minister or other officials of the Ministry had been intended to have the power to sell it would be more than odd to find it conferred in such clear and specific terms on the seizing officer alone. The fact that the power is given to the seizing officer alone may be very inconvenient for the Ministries, and it may be that when the farmers of the Order of 1945 were altering the Order of 1940 they should have sought to have provision made authorising other officials of the Ministries to sell. But this has not been done, and in my opinion to hold that the Ministry of Agriculture, acting through other officials, was entitled to sell the animals seized really amounts to a process of filling up a supposed gap in a statutory order, the precise process which was reprobated in the House of Lords in *Magor and St. Mellons R.D.C. v. Newport Corporation* (1).

Taking the view then that the Ministry had no authority under the Order of 1945 to sell the animals while the question whether they were liable to forfeiture was still undecided, and that the phrase " the " proceeds of sale thereof " in sub-paragraph (4) of paragraph 5 of the Order refers to the proceeds of a

(1) [1952] A.C. 189.

sale authorised by the Order, I am of opinion that the appropriate application to the court of summary jurisdiction ought not to have been for the forfeiture of the proceeds of sale of the animals, but for the forfeiture of the animals themselves. I do not find it necessary to consider any question as to the powers of a court of summary jurisdiction to amend a summons inasmuch as in my view sub-paragraph (4) prescribes that an application for one type of order should be made in one case and for the other type of order in the other case, and directs that the application for the appropriate form of order, " as the case may be ", should be made as soon as practicable.

I am accordingly of opinion that the learned resident magistrate was right in law in holding as he did and dismissing the summons. From what I have said it will be clear that the basis of this conclusion is solely that the application made to the court of summary jurisdiction was not the appropriate form of application under the Regulations which in the particular circumstances of the present case would entitle the resident magistrate to embark on an inquiry as to whether the cattle had been imported or otherwise dealt with in contravention of the Regulations or to make a forfeiture order in regard to them. There has been no adjudication as to the validity of the seizure or as to whether the animals were at the time thereof forfeited.

LORD MACDERMOTT L.C.J. : I agree with the conclusion arrived at by my brother Black for the reasons he has stated. I do so with regret, for not only does the decision turn on what may fairly be described as a technicality, but it deprives the local and convenient court of all jurisdiction to reach a finding on the merits. That, however, is where the language of paragraph 5 of the 1945 Regulations leads us and I can

only hope that the time is not far distant when a revised edition of those Regulations will reduce the difficulties of the present text.

Appeal dismissed.

Solicitor for the Minister : *Chief Crown Solicitor.*

Solicitor for the respondent : *J. G. Lennon.*

J.P.

STOCK v. UREY (1).

Sale of Goods—Breach of warranty—Sum claimed in excess of purchase price— Measure of damages—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), ss. 12 (1), (2), 53 (2).

The purchaser of a motor car which was later seized by the Customs authorities as having been illegally imported into Northern Ireland paid the tax and duty which were due in order to regain possession. The sum so paid by the purchaser exceeded the price which he had paid for the car.

Held, that the sum paid to the Customs authorities was the proper measure of the "loss directly and naturally resulting" from the breach of the implied warranty for quiet possession and of the implied condition, treated as a warranty, that the seller had the right to sell the car, and that accordingly the whole of such sum was recoverable by the purchaser notwithstanding that it exceeded the purchase price.

APPEAL from the Additional County Court Judge for the County of Antrim.

The plaintiff purchased a motor car from the defendant for £35 and later sold it to one Eakin for £58 10*s*. While the car was in the possession of Eakin it was seized by the Customs authorities as having been illegally imported into Northern Ireland. Eakin paid to the Customs authorities the sum of £68 3*s*. 2*d*., the amount due in respect of duty and tax, in order to regain possession of the car. Eakin sued the plaintiff for the sum of £68 3*s*. 2*d*. as damages for breach of the implied warranty for quiet possession and of the implied condition, treated as a warranty, that the seller had the right to sell the car. Eakin was awarded the full amount claimed and costs, and the plaintiff paid £86 13*s*. 10*d*. on foot of the decree. The plaintiff then sued the defendant to recover that sum from the defendants as damages for the breach of the implied warranty and condition on the sale of the car to the plaintiff. The defendant contended that since Eakin might have abandoned the car and then sued for the purchase price which he had paid for it, the sum of

(1) Before Curran J. sitting as Judge of Assize; May 9, 1951; Dec. 18, 1953.

£68 3*s*. 2*d*., being in excess of that price, could not be regarded as the reasonable measure of the damage " directly and naturally resulting " from the breaches alleged. The acting county court judge gave a decree for the full amount claimed and the defendant now appealed.

Patton Q.C. and *Moody* for the plaintiff.

Agnew Q.C. and *Little* for the defendant.

Cur. adv. vult.

CURRAN J.: The claim by Eakin against Stock was based upon breach of warranty and breach of condition. The claim by Stock against Urey is on the same basis. The legal basis for the claim is to be found in sections 12 and 53 of the Sale of Goods Act, 1893. Section 12 (1) provides for an implied *condition* on the part of the seller that he has a right to sell the goods. Since Eakin retained the motor car and sued for damages it would appear that the implied condition has been treated as a warranty. Accordingly, the claim is, in substance, for damages for breach of warranty under two heads, (1) breach of condition (treated as a warranty) that the seller had a right to sell, and (2) breach of warranty under section 12 (2) of the Sale of Goods Act, 1893, that the buyer shall have and enjoy quiet possession of the goods. Mr. Agnew contends that Eakin need not have paid the £68 3*s*. 2*d*. to the Customs authorities. He might have let the car go and have sued Stock for the price he paid him, namely, £58 10*s*. 0*d*. Section 53 (2) provides that the measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

As I see it, the purchaser was warranted quiet enjoyment—in order to secure that quiet enjoyment he had to pay the duty to the Customs authorities. That payment, in my view, directly and naturally resulted from the breach of warranty.

Mr. Agnew has contended that the payment to the Customs authorities was in excess of the actual value of the car and was not "reasonable and natural". Undoubtedly, the seizure of the car was an unusual occurrence and there is substance in the contention that it was not reasonably foreseeable by the defendant —assuming that he had no knowledge of the illegal importation of the car from Eire. The substance of the breach of warranty is, however, that the car had been illegally imported and was liable to seizure. Accordingly, section 53 (2), in my opinion, must be read in this way, "the estimated loss directly and naturally resulting in the ordinary course of events" —from a breach of warranty for quiet enjoyment, such breach being based upon a liability to seizure for illegal importation. What "directly and naturally "results in the ordinary course of events" from a breach of warranty must depend, in my view, on the nature of the grounds upon which the warranty for quiet enjoyment is impeached—in this case liability to seizure for illegal importation. From the breach of warranty, based upon this liability to seizure, the payment made to prevent such seizure and to protect the purchaser's quiet enjoyment, in my opinion, was reasonable and natural, and directly and naturally resulted, in the ordinary course of events, from the breach of warranty. Whether the amount paid was greater or less than the actual value of the car cannot, in my view affect the matter. I accordingly affirm the decree.

Appeal dismissed.

Solicitors for the plaintiff: *N. & F. Tughan & Walmsley.*

Solicitors for the defendant: *W. G. Maginess & Sons.*

J.P.

McGUIGAN v. POLLOCK AND ANOTHER; McCONNELL AND THE ULSTER TRANSPORT AUTHORITY, THIRD PARTIES (1).

Practice—Third party procedure—Third party a public authority—Action begun more than twelve months after accident—Whether claim against third party barred—Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937 (1 Edw. 8 & 1 Geo. 6, c. 9), s. 16 (1) (c)—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1—Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1951 (14 & 15 Geo. 6, c. 7), s. 9—R.S.C. Or. 16, r. 52.

The plaintiff's motor car was damaged in a collision involving a motor lorry owned by the first defendant and driven by the second defendant and a bus owned by the Ulster Transport Authority. More than twelve months after the collision the plaintiff began an action against the first and second defendants who thereupon, by leave of the court, joined the Transport Authority and the driver of the bus as third parties, claiming from them an indemnity or contribution under the provisions of section 16 (1) (*c*) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937. Each of the third parties claimed the protection of the Public Authorities Protection Act, 1893. The defendants applied for directions as to the determination of the issues arising between them and the third parties.

Held, by the Court of Appeal (Porter and Black L.JJ. and Curran J.), that there was an issue between the defendants and the third parties which should be tried at the trial of the action between the plaintiff and the defendants: *per* Porter L.J. and Curran J. on the ground that the defendants' claim against the third parties was in respect of a statutory right to indemnity or contribution to which the Public Authorities Protection Act, 1893, had no application: *per* Black L.J., who inclined to the contrary view, on the ground that the question of law involved was one of doubt and should therefore be raised in proceedings upon which an appeal could be had to the House of Lords.

Per Black L.J.: When a doubtful point has been decided in a particular way by the Court of Appeal in England the courts in Northern Ireland should be slow to differ, especially in a case where the decision of the court in Northern Ireland would not be subject to an appeal to the House of Lords.

Decision of Lord MacDermott L.C.J. affirmed.

(1) In the Queen's Bench Division before Lord MacDermott L.C.J.: Feb. 6, 1953. In the Court of Appeal before Porter and Black L.JJ. and Curran J.: March 26, 1953; March 31, 1954.

Motion by the defendants for an order pursuant to Order 16, rule 52, giving directions for the trial of the liability of third parties.

On January 2, 1951, the plaintiff's motor car was damaged in an accident in which an omnibus belonging to the Ulster Transport Authority and a motor lorry were involved. More than twelve months later, on July 25, 1952, the plaintiff issued a writ against the owners and driver of the lorry claiming damages in respect of the damage to the motor car. By an order dated November 7, 1952, the defendants obtained the leave of the court to issue and serve a third party notice upon the Transport Authority and the driver of the bus. This third party notice was issued and served on the third parties on November 11, 1952. The third parties in their defence objected in point of law that the claim of the defendants for contribution was barred by section 1 of the Public Authorities Protection Act, 1893. The defendants thereupon applied for directions for determining how the issues arising between them and the third parties on the third party notice should be decided.

Kelly for the defendants. The defendants' claim is in respect of a statutory right given to them in the circumstances of this case, and is not a claim in respect of an "act, neglect or default" on the part of the Authority or their servant. The Public Authorities Protection Act, 1893, does not therefore apply: see *Tuckwood v. Rotherham Corporation* (1). The indemnity claimed in that case was provided by section 6 of the Workmen's Compensation Act, 1906, but the principle is applicable to this case.

Tuckwood's case (1) seems to be the only relevant authority on the 1893 Act, but the point under discussion in the present case has been considered in relation to the Limitation Act, 1939, which has replaced the Act of 1893 in England. The Limitation Act, 1939, differs materially from the earlier Act because it provides that the time begins to run from the time

(1) [1921] 1 K.B. 526.

when the cause of action accrues instead of from the act, neglect or default complained of. In *Merlihan v. Pope* (1) Birkett J. held that the time began to run in favour of the public authority joined as a third party from the date of the accident, but in a later case of *Hordern-Richmond Ltd. v. Duncan* (2) Cassels J. appears to have taken the view that in those circumstances time would not begin to run in favour of a third party until the defendant had been found liable to the plaintiff. If this case is not governed by the principle laid down in *Tuckwood's* case (3) I submit that the view of Cassels J. should be preferred to that of Birkett J., for otherwise a defendant may be deprived of his right to contribution merely because the plaintiff has delayed over the commencement of his proceedings.

Lowry for the third parties. The English cases show at least that third party procedure constitutes a "proceeding" against a public authority, for both judges considered the 1939 Act to be applicable, and Birkett J. would have had no difficulty in dealing with a case under the 1893 Act. The 1893 Act was amended in 1951, and at that time the Legislature must have had in mind the 1937 Act, and yet there is nothing to suggest that proceedings under the 1937 Act were intended to be excluded. If the 1893 Act applies to this case I submit that the time must run from the date of the accident. This may have the result of excluding any claim by the defendants against third parties, but in other circumstances the Act has been held to bar a party's right before it had become vested: see *Freeborn v. Leeming* (4); *Williams v. Mersey Docks & Harbour Board* (5).

On the wording of the Act I submit that it applies to this case: its words are wide, referring to any proceedings in respect of an act, neglect or default. Until the third party cases it was generally assumed that no proceedings could be brought against a public authority after six months had elapsed: see per

(1) [1946] K.B. 166.
(2) [1947] K.B. 545.
(3) [1921] 1 K.B. 526.
(4) [1926] 1 K.B. 160.
(5) [1905] 1 K.B. 804.

Bankes L.J. in *Freeborn v. Leeming* (1). The decision in *Tuckwood's* case (2) was based on three grounds only one of which is material to this case, and with regard to that the case may be distinguishable because in the present case the liability of the defendants and of the third parties are both based on negligence, whereas in *Tuckwood's* case (2) the court was considering a claim to be indemnified against liability for the payment of workmen's compensation.

The right of action given by the Fatal Accidents Acts is clearly a statutory right, and there are cases in which the limitation period under those Acts and under the Public Authorities Protection Act have been considered. In *Gawley v. Belfast Corporation* (3) a strong Court of Appeal held that a widow's claim under the Fatal Accidents Acts was barred by the Public Authorities Protection Act because it was not brought within six months of the accident, although the death did not occur until after the six months had elapsed. It is right to say that this case was subjected to some implied criticism in *British Electric Railway Co. v. Gentile* (4), but it was followed and approved by Kennedy C.J. in *Appelbe v. West Cork Board of Health* (5), although it was not followed in *Walsh v. Ballina U.D.C.* (6).

If the court decides in my favour on this application I would be entitled to an order dismissing the third parties from the action : *Greville v. Hayes* (7).

Kelly replied.

The plaintiff was not represented at the hearing of the application.

Lord MacDermott L.C.J. : This is an application for directions made by the defendants in a road accident case for the purpose of determining how the issues arising between the defendants and the third parties on the third party notice are to be decided. The

(1) [1926] 1 K.B. at 169-70.
(2) [1921] 1 K.B. 526.
(3) [1908] 2 I.R. 34.
(4) [1914] A.C. 1034.
(5) [1929] I.R. 107.
(6) (1921) 55 I.L.T.R. 140.
(7) [1894] 2 I.R. 20.

point raised is very interesting and one which I find very difficult, and I am much obliged to counsel on both sides for the able manner in which they have presented their arguments to the court. If it were not for the fact that this matter may affect the position of the plaintiff in the action, who is not represented on this application, I would be inclined to defer my decision, but I cannot overlook the fact that that course would involve delay for the plaintiff, and, in view of the approach of the Assizes and the fact that my decision may be subject to review, that delay might be considerable. I have, moreover, formed a definite conclusion, and one which I do not think would be altered upon further consideration, and accordingly I propose to state my conclusions and the grounds upon which they are based.

[His Lordship referred to the facts of the case and continued] :

The plaintiff issued a writ against the defendants, the driver and the owners of the motor lorry, more than one year after the accident, on July 25, 1952, and having thus been sued, the defendants sought liberty to add as third parties the owners and the driver of the omnibus, namely the Ulster Transport Authority and their servant McConnell. That liberty was given them by an order of this Court made by Black L.J. on November 7, 1952, and the defendants are now applying for directions as to the determination of the issues arising between them and the third parties.

At the outset, I should say that I have no doubt that if I come to the conclusion that the third parties have no case to meet, I am entitled to refuse this application having regard to the wording of Order 16, rule 52. It is to be noted also that the application for liberty to join the third parties was granted on the ground that the defendants claimed to be entitled to an indemnity or a contribution from the third parties by virtue of the provisions of section 16 (1) (*c*) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937, the material portion of which is as follows :

[His Lordship quoted from the section]. What the defendants are saying therefore is that if they were held liable to the plaintiff in negligence then they would be entitled to a contribution order under the provisions of the section as against the Ulster Transport Authority and their driver on the ground that their negligence in the management and control of the bus contributed to the damage suffered by the plaintiff. I must assume for the purposes of this application that the Authority and their servant, the driver of the bus, were acting in the course of the duty of the Authority as a Public Authority at the material time, and that both these parties are within the protection afforded by the Public Authorities Protection Act. I assume further, and indeed it is admitted, that the relevant period of limitation under that Act is twelve months, and that the writ was issued more than twelve months after the accident. What the Act of 1893, which is still operative in this jurisdiction although it has been superseded in England by the Limitation Act, 1939, says with regard to this matter is this: [His Lordship quoted the section and referred to the alteration of the period of limitation from six to twelve months made by section 9 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1951].

The contention of the third parties, therefore, is that these proceedings fall within the scope of the Act of 1893, that time is to be measured from the time of the act, neglect or default alleged against them, and that the act, neglect or default alleged in this case was that which caused or contributed to the accident and which arose in point of time on January 2, 1951. If that contention is correct, the present proceedings brought by way of third party notice against the Ulster Transport Authority and their driver are out of time and barred in such a way that the present application ought to be refused.

I am assuming throughout, and it is conceded by Mr. Kelly, that proceedings brought by way of a third

party notice would come within the meaning of the terms " action, prosecution or other proceeding " contained in section 1 of the 1893 Act, and the main issue therefore seems to me to be whether, in the first place, the Act can apply at all to the defendants claim against the third parties and, secondly, if the Act does so apply, whether the time runs from the date of the accident or from some other later occasion. Does the Act, assuming that a claim made by way of third party procedure is a proceeding within the section, apply at all to the circumstances of this case or, in other words, is there any act, neglect or default in respect of which these proceedings are brought? Mr. Lowry says that the act, neglect or default in respect of which the proceedings are brought, must be some act, neglect or default on the part of the driver of the bus which contributed to the accident, while Mr. Kelly says that even if the Act can apply to the circumstances of this case at all, the act, neglect or default referred to may relate, not to the original accident, but to something which can only arise after the defendants have been adjudged to be liable to the owner of the car.

The matter turns, in my opinion, on what I may term the main issue of the case, although I am not to be taken by that to suggest that the other matters which have been canvassed before me are not important. That issue is whether the defendants' claim against the third party comes within the ambit of the phrase found in the statute " for any act, neglect or default " in the execution . . . . of any public duty or authority", it being borne in mind that the basis upon which the defendants were granted liberty to join the third parties was that the Ulster Transport Authority's bus was driven in a negligent manner and that the negligence in the driving of the bus caused or contributed to the damage suffered by the plaintiff.

The one net issue seems to me to be whether the claim made by way of third party procedure can be described as a claim " in respect of an act, neglect or " default " of the Authority so as to fall within the

terms of section 1 of the Act of 1893 or not. The authorities on the point are in a difficult state, and the conflict between them shows just how difficult the whole question is. Mr. Kelly for the defendants relies on the decision of the Court of Appeal in England in the case of *Tuckwood v. Rotherham Corporation* (1). The court in that case was an impressive one, consisting of Bankes, Scrutton and Atkin L.JJ. The facts of the case were that a carter employed by the plaintiff was leading a horse and cart along a road in the course of his employment when the cart was struck by a tramcar owned by the defendants. The cart overturned and the carter received serious injuries. The carter made claim against his employer and was paid compensation under the Workmen's Compensation Acts, and thereafter his employer brought an action against the Corporation under section 6 of the Workmen's Compensation Act, 1906, alleging negligence in the driving of the tramcar and claiming an indemnity in respect of the amount which had been awarded to the workman. The employer was met by the answer, put forward on behalf of the Corporation, that the claim was out of time and barred by the provisions of the Public Authorities Protection Act. The Court of Appeal held that the Act did not apply to the case and one of the grounds upon which that conclusion was reached was that although the claim was obviously related to the original accident which occurred outside the period of limitation in that the right of indemnity clearly arose out of the negligence of the Corporation and indeed could not have arisen without that negligence, it was not a claim in respect of any act neglect or default of the Corporation. In the course of his judgment Bankes L.J., after referring to the provisions of section 1 of the Act says : " The question " thus is, is this action claiming the right to the " statutory indemnity an action in respect of any " alleged neglect in the execution of any such duty ? " In my opinion it is not. It is true that in order to

(1) [1921] 1 K.B. 526.

"succeed in the action the plaintiff must establish "that the workman would have been entitled to "recover damages against the corporation for the "negligence of their servant in driving the tramcar. "That no doubt is an essential part of his cause of "action; but I do not think that it is true to say that "the action claiming the right to the statutory in- "demnity is an action in respect of any alleged neglect "in the execution of a duty within the meaning of the "language used in the section. To accept any other "interpretation of the statute would lead to this "result, that in a very large number of cases, if not "the great majority of cases, a person who sought to "take advantage of the indemnity clause in s. 6 of the "Workmen's Compensation Act, 1906, would find that "he would be out of time, because the proceedings "instituted by the workman might very probably "not be concluded by the establishment of the work- "man's right to recover compensation within six "months of the date of the accident."

"In my judgment the Public Authorities Protection "Act does not apply to this particular and very special "kind of action, and on that ground the appeal fails" (1).

Scrutton L.J. bases his conclusions, which are to the same effect, on three distinct grounds, only one of which is material to this case, and with regard to that he says: "Secondly, and in some respects this is "very like the first ground, I think, looking at the "words of the Public Authorities Protection Act, that "the claim against the corporation is not for an act "done in execution of an Act of Parliament or of a "public duty or authority, or in respect of a neglect in "the execution of any such Act, duty, or authority, "It is true that negligence is one of the ingredients of "the liability to indemnify, but there are several "other ingredients of the liability—namely, that the "person asking for the indemnity has, under the "Workmen's Compensation Act, either paid or been "compelled by an order to pay the compensation

(1) Ibid. 533.

" provided by the Act, which may be something quite " different from the damages which would follow at " common law for an act of negligence. In my view " on that ground also, which I gather is the view " adopted by my Lord, the case does not come within " the words of the Act " (1).

Atkin L.J. says this, and the reasoning seems to me to be very cogent : " I find it difficult to believe that " the Legislature can have imposed a limit of six " months unless upon the supposition that a cause of " action, which is prohibited if it is not brought within " the six months, came into existence at the beginning " of the six months, that is to say, upon the happening " of the neglect or default complained of. If that is " the true view, one can understand the Act applying " because then there is a period of six months during " which proceedings might be taken against the public " authority ; but when an action is brought in respect " of, in one sense, a neglect or default under circum- " stances where no cause of action has arisen during " the six months, and which, if the defendants' con- " tention were correct, would be barred after the " expiration of the six months, it appears to me " impossible to suppose that the Act, passed for the " protection of the public authority, should be so " applied as to defeat any cause of action against the " public authority at all."

" It is easy to imagine circumstances in which, if the " defendants' construction of the Act were correct, the " plaintiff would be deprived of any right of action " at all. It is clear to my mind that under this " indemnity section, s. 6, sub-s. 2, it is a condition " precedent that the workman shall have recovered " compensation. I am bound by a decision of this " Court (*Page v. Burtwell*) (2) that within this section " the words ' recover compensation ' or ' recover " ' damages ' are satisfied if, in fact, the workman " asks for and receives compensation or damages, " whether or not he has taken legal proceedings in the

(1) Ibid. 535-6. (2) [1908] 2 K.B. 758.

" one case or in the other. I accept that view, but " nevertheless it may very well happen, indeed it very " often happens, that the employer from the beginning " disputes his liability to pay compensation, and the " workman is obliged to commence arbitration pro- " ceedings to recover compensation and does not " obtain an award until after the expiration of six " months from the date of the accident. Further, it " is, as a general rule, a condition precedent to a right " to compensation that a claim is made within six " months from the occurrence of the accident, or in the " case of death within six months from the time of " death. Therefore it may happen that a workman " may be so badly injured that he is incapable of " making a claim within the six months, and then dies, " and his dependants then claim compensation.

" Although the employer comes under no liability to " pay compensation until more than six months after " the date of the accident, he will have lost his right to " indemnity from the public authority. To my mind " that was never contemplated, and affords a very " strong reason for refusing to put the construction " upon the Act of 1893 contended for by the defend- " ants. In my opinion this action is merely brought " to recover the statutory indemnity, and, although " proof of neglect or default in the corporation in " respect of its tramway undertaking is necessary in " order to claim the indemnity, the action is not " brought in respect of that neglect or default within " the meaning of the Act " (1).

That authority, and I say it with great respect, seems to me very much in point. Although the right of indemnity claimed in that case arose under a different statute from the one in question here, Mr. Kelly says that the same reasoning should be applied in this case and it seems to me, as far as that is concerned, to be difficult in point of logic to distinguish the two cases.

If the matter ended there, it would be relatively simple, but I must take into account the fact that a

(1) [1921] 1 K.B. at 539.

similar situation to the one before me to-day was debated before Birkett J. in the case of *Merlihan v. Pope* (1). In that case, Birkett J. appears to have taken the view that in a case where contribution is claimed from a third party on the basis that he was a joint tortfeasor, the Limitation Act 1939 would apply and that the time would run from the date of the accident so as to preclude a claim made against a public authority as a third party more than six months afterwards. Two years later, however, in *Hordern-Richmond Ltd. v. Duncan* (2), a similar but not identical case, Cassels J. came to a view which to me seems irreconcilable with that of Birkett J., his view being that if time ran at all in the circumstances, it would only run from the time when the defendant was held liable to the plaintiff. Echoing his words, Mr. Kelly would say in this case that if time runs at all under the Public Authorities Protection Act, it will run only from the time when the defendants have been held liable in respect of the damage suffered by the plaintiff, because until that time, the defendant can have no claim against the third party or anyone else.

It seems strange to me that in *Tuckwood's* case (3) no reference was made to another line of cases to which Mr. Lowry has drawn the attention of the court, namely cases under the provisions of the Fatal Accidents Acts brought to recover damages on behalf of dependants in respect of the death of the bread-winner of the family. When I say that it is strange that those cases were not referred to in *Tuckwood's* case (3) I may say that it is equally strange that *Tuckwood's* (3) case was not referred to in the cases before Cassels J. and Birkett J.

The high water-mark of the line of cases upon which Mr. Lowry relies is the case of *Gawley v. Belfast Corporation* (4), a decision of a strong Irish Court of Appeal. It was held in that case that a widow's action under the Fatal Accidents Acts, brought more than six months

(1) [1946] K.B. 166.
(2) [1947] K.B. 545.
(3) [1921] 1 K.B. 526.
(4) [1908] 2 I.R. 34.

after the accident from which her husband's death had resulted was out of time by reason of the provisions of the Public Authorities Protection Act, that Act replacing the period of limitation laid down by Lord Campbell's Act. The facts of the case are interesting and the headnote reads as follows: "On the 13th "June, 1906, G. was injured by a collision with a "tramcar in Belfast, and on the 30th July, 1906, he "brought an action for damages for negligence against "the defendants, who had taken over and were running "the tramways in Belfast, under the provisions of "4 Edw. 7 c. ccxxix (Local and Personal). G. died on "the 28th February, 1907, from the effect of the "injuries, and, on the 11th April, 1907, his widow "brought an action against the defendants on behalf "of herself and her children, for damages for the death "of her husband. The defendants pleaded that as "Mrs. G.'s action had not been brought within six "months from the alleged act of negligence, it was "barred by the Public Authorities Protection Act, "1893:—*Held* (affirming the decision of the King's "Bench Division), that, as the action was not brought "within six months from the date of the accident, it "was barred by section 1 of the Public Authorities "Protection Act, 1893. *Held*, also, that the defend- "ants, in working the tramways under 4 Edw. 7, c. "ccxxix, were a public authority within the meaning "of the Public Authorities Protection Act, 1893."

That is a very strong decision, because it means that in cases where the defendant is a public authority the new right of action given by the Fatal Accidents Act in respect of a death can only be availed of if the deceased dies within six months of the accident and the proceedings under the statute are commenced after his death and before the expiry of the period, and that all cases are ruled out of reckoning for relief in which more than six months elapses between the negligent act of the defendant and the death which results from it. Mr. Lowry very fairly says that if ever there was a right of action arising solely out of a statute, it is the right given by the Fatal Accidents Acts, which was an innovation, constituting an alteration of the principles

of common law. The right given to the dependants is not merely a right to step into the shoes of the deceased, but is quite a different right from that which would have subsisted in him had he survived. It seems to me that if the decision in that case is right—and if I express any doubt as to its correctness I do so only with the greatest humility in view of the constitution of the court which decided it, Walker L.C., Fitzgibbon and Holmes L.JJ. -then my decision involves choosing between the relative merits of that case and *Tuckwood's* case (1).

Gawley's case (2) has been subjected to some criticism, and in the case of *British Electric Railway Company v. Gentile* (3) it was cited in argument for the purpose of showing that a claim under the Canadian Families Compensation Act, an Act similar in terms to the Fatal Accidents Act, was out of time. The limitation of time in that case, which was brought to recover damages for the death of a man who had been killed by one of the Company's tramcars, arose under a special Act of the province of British Columbia under which the Company operated. The relevant provisions of that act are as follows: "All actions or "suits for indemnity for any damage or injury sus- "tained by reason of the tramway or railway, or the "works or operations of the company, shall be com- "menced within six months next after the time when "such supposed damage is sustained, or, if there is "continuance of damage, within six months next after "the doing or committing of such damage ceases, and "not afterwards." The Judicial Committee of the Privy Council, Lord Dunedin, Lord Moulton, Lord Parker of Waddington and Sir George Farwell, took the view that the Canadian Families Compensation Act was equivalent to the Fatal Accidents Act and decided that the claim was based on a different cause of action from that which the deceased would have had and was not one to which the limitation provisions of the special Act would have applied. That seems to

(1) [1921] 1 K.B. 526.
(2) [1908] 2 I.R. 34.
(3) [1914] A.C. 1034.

me to be very much in the teeth of the reasoning found in *Gawley's* case (1).

Although a decision of the Irish Court of Appeal compels the greatest respect, I do not think that I am bound to follow the decision of *Gawley's* case (1), and looking at that case and the case of *Tuckwood* (2) one must consider the merits of the reasoning in the two cases. On doing so, I find myself coming back to the words of Lord Atkin in his judgment in *Tuckwood's* case (2) to which I have referred. I find it very difficult to think that a claim of this kind was intended to be excluded by the operation of the Act of 1893, although it is true that, as is pointed out in *Tuckwood's* case (2), an act, neglect or default on the part of the public authority is an essential ingredient in the cause of action. Coming therefore to the best conclusion I can, I think that the reasoning of the decision in *Tuckwood's* case (2) is such that I should decide that the claim of the defendant against the third party is not caught by the Act of 1893, and for that reason that this application ought to be allowed.

Order accordingly.

The third parties appealed to the Court of Appeal.

McSparran for the third parties.

Agnew Q.C. and *Kelly* for the defendants.

Cur. adv. vult.

PORTER L.J. : This is an appeal by the third parties from an order made by the Lord Chief Justice on February 6, 1953, giving certain directions as to the trial of the issues between the defendants and the third parties. The notice of appeal asks that the said order be reversed, that the appellants and each of them be dismissed from the action, and that the costs of this appeal and the motion for directions and all

(1) [1908] 2 I.R. 34. (2) [1921] 1 K.B. 526.

proceedings against the appellants be paid by the defendants to the appellants.

On July 25, 1952, the plaintiff issued a writ against the defendants for loss and damage caused by the negligence of the defendants in the driving, management and control of a motor lorry, and in the statement of claim delivered on October 23, 1952, it was alleged that the first named defendant, as servant or agent of the second named defendant, on January 2, 1951, so negligently drove, managed and controlled a motor lorry, the property of the second named defendant, that the same caused a motor bus to collide with the plaintiff's car causing to the plaintiff loss and damage. The defendants denied that they or either of them were negligent, or that the motor lorry caused a motor bus to collide with the plaintiff's car.

On November 7, 1952, an order was made by Black L.J. giving the defendants leave to issue and serve a third party notice upon the appellants, and the defendants in their statement of claim delivered on February 18, 1953, alleged that the first named appellant, as servant or agent of the second named appellant, so negligently, carelessly and unskilfully drove, managed and controlled a motor omnibus, the property of the second named appellant, that the motor omnibus was driven against and collided with the motor car of the plaintiff, and that defendants claimed that in the event of them or either of them being held liable to the plaintiff, they were entitled to contribution from the appellants or either of them to the extent of the whole of their liability.

The appellants by their defence delivered March 5, 1953, denied that they were guilty of any negligence or that a motor omnibus driven by them was driven against or collided with the plaintiff's motor car or that the defendants were entitled to contribution from the appellants to any extent, and the appellants objected in point of law that the claim of the defendants for contribution against the appellants was barred by Section 1 of the Public Authorities Protection Act, 1893.

The relevant words of the section are as follows :—

" Where . . . .any action, prosecution, or other pro-
" ceeding is commenced . . . . against any person for
" any act done in pursuance or execution or intended
" execution of any Act of Parliament, or of any public
" duty or authority, or in respect of any neglect or
" default in the execution of any such Act, duty, or
" authority . . . . the action, prosecution, or other
" proceeding shall not lie or be instituted unless it is
" commenced within six months next after the act
" neglect or default complained of, or in the case of a
" continuance of injury or damage, within six months
" next after the ceasing thereof ". By section 9 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1951, the period of limitation was increased from six months to twelve months. In England under section 21 (1) of the Limitation Act, 1939, the period of limitation is one year, but it should be observed that the period commences not from the date of the act, neglect or default of the public authority but from the date on which the cause of action accrued.

The claim of the defendants to a contribution from the appellants is based on section 16 (1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, which provides that where damage is suffered by any person as a result of a tort, any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would, if sued, have been, liable in respect of the same damage whether as a joint tortfeasor or otherwise.

It was assumed without question that at the time of the alleged collision the Ulster Transport Authority and William John McConnell, the driver of the omnibus, were acting in the course of the duty of the Authority as a public authority.

Mr. McSparran for the appellants said that the plaintiff's cause of action (if any) against the appellants was now barred, the period of limitation having expired on the 2nd January, 1952, and it was unreasonable that the defendants who ex hypothesi were tortfeasors should have an advantage in suing

the appellants which was denied to the innocent plaintiff.

He contended that the claim for a contribution against the appellants was a " proceeding " in respect of " an act neglect or default " which occurred on January 2, 1951, and was therefore barred on the expiration of twelve months from the date of that act neglect or default. He referred us to *Merlihan v. Pope* (1) as a decision in his favour. In that case the plaintiff, who was travelling as a passenger in a Canadian War Department motor truck driven by Pagnello, a member of the Canadian War forces, was injured on March 15, 1943, in a collision between the truck and a motor van owned by the first defendants and driven by their servant the second defendant. On May 17, 1944, the plaintiff commenced proceedings against the defendants who on May 15, 1945, obtained an order joining Pagnello as third party. On June 14, 1945, judgment was given against the defendants for £300 damages. Birkett J. found that the drivers of both vehicles had been guilty of negligence contributing to the plaintiff's injuries. The third party contended that the claim to recover contribution was barred by Section 21 (1) of the Limitation Act 1939, since no action had been brought against him within the period of limitation. The defendants claimed that their cause of action against the third party did not accrue until their liability had been established by the judgment and therefore was not barred, that as between them and the third party the date of the accident was irrelevant, and that they were entitled to contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935, Section 6 (1) because the third party " would if sued have been liable " in respect of the damage. They contended that the words in the sub-section referring to any other tortfeasor " who is, or would if sued have been, liable " should be read as who is, or would if sued *in time* have been, liable. Birkett J. rejected this interpretation of the words, and held against the defendants on the

(1) [1946] 1 K.B. 166.

express ground that the cause of action in fact accrued on March 15, 1943.

The matter was further discussed two years later in *Hordern-Richmond Ltd. v. Duncan* (1) a peculiar case in which the plaintiffs claimed a declaration that they were entitled to indemnity or contribution in respect of any claim made against them arising out of an accident which occurred on November 2, 1944, when the plaintiff's motor lorry came into collision with an army lorry driven by the defendant who was a sergeant in the army. Four soldiers who were travelling in the army lorry were injured in the collision, but none of them had made any claim or brought any proceedings against the plaintiffs or the defendant in respect of the accident. Nevertheless the plaintiffs, fearing that a claim might be made against them and that if they were found liable they might as a result of the decision in *Merlihan's* case (2) be prevented from recovering indemnity or contribution from the defendant, issued a writ against the defendant within one year from the date of the accident claiming a declaration that they were entitled to indemnity or contribution in respect of any claim made against them arising out of the accident. Cassels J. granted the declaration, but referring to the decision of Birkett J. said: "I find "it difficult to say that I should have arrived at the "same conclusion as Birkett J. arrived at upon the "same facts. I take the view that the Limitation "Act only starts to run in favour of a third party in "such circumstances as these when the defendants "has been made liable for the damages. Whether "the judge who tries this case, if it ever should be "brought to trial, will subscribe to the decision of "Birkett J. or will say that the point does not prevail "in favour of the third party I do not know; but it "seems to me that, unless the legislature interferes, "this position is bound to be faced in any case arising "out of negligence where a plaintiff forbears to sue "one of the parties responsible for more than twelve "months and the other party alleged to be responsible "is entitled to the protection of the Limitation Act."

(1) [1947] K.B. 545. (2) [1946] 1 K.B. 166.

Early this year this question was discussed in *Littlewood v. George Wimpey & Co. Ltd. and British Overseas Airways Corporation* (1). The facts differed from *Merlihan's* case (2) in one important matter, viz. the Corporation was sued as a defendant by the plaintiff and was also served with a third party notice by George Wimpey & Co. Ltd., whereas in *Merlihan's* case (2) Pagnello was merely a third party. Littlewood was injured on July 28, 1949. The writ was issued on April 26, 1951, against both defendants and a third party notice was issued against the Corporation on June 8, 1951. Parker J. held that the Company was guilty of negligence, and the Corporation of a breach of statutory duty, but that the Corporation being a public authority was entitled to the protection of the Limitation Act, 1939, as the plaintiff's proceedings were not commenced within a year from the cause of action. With regard to the third party proceedings he expressed his dissent from the decision of Birkett J. and took the same view as Cassels J. that time under the Limitation Act only starts to run in favour of a third party when the defendant has been found to be liable in damages, and not from the date of the neglect or default which caused the damage. He then proceeded to discuss whether the Corporation was a tortfeasor against whom the Company was entitled to recover contribution under section 6 (1) (*e*) of the Act of 1935, which corresponds to section 16 (1) of our 1937 Act, and said : " It is clear that where the " word ' liable ' occurs . . . . it means ' held liable ' " and a person cannot be held liable without being " successfully sued to judgment. It seems to me that " the ordinary meaning of the words here is that, " if the other tortfeasor has been successfully sued to " judgment, contribution can be obtained from him, " and that recovery can also be made against him if he " has not been sued, but, if he had been sued to judg- " ment, he would have been held liable. The distinc- " tion which is made, it seems to me, in that paragraph " is between the tortfeasor who has been sued to

(1) [1953] 1 All E.R. 583. (2) [1946] 1 K.B. 166.

" judgment and the tortfeasor who has not been sued " at all or not been sued to judgment " (1). Notwithstanding the absurdities which, as he admitted, resulted from this construction, he held that as the Corporation had been sued to judgment and had been held not liable, the Company was not entitled to contribution. The Court of Appeal (Singleton and Morris L.JJ., Denning L.J. dissenting) affirmed the decision holding that the word " liable " meant " held liable " by judgment (or possibly by admission or on payment) and that the section should not be construed by the inclusion of words which assumed a hypothetical action brought by the plaintiff " in time " (2).

Denning L.J. said (3) that " liable " meant responsible in law and as the Corporation had been found one third responsible. it was liable, and if the words " if " sued " modified the construction so that " liable " must be read to mean " held liable " then the hypothetical action implied by the words " if sued " must means an action brought in time to be effective and the Corporation would thus fall within those words.

Morris and Denning L.JJ. held that the reasoning of the Court in *Tuckwood v. Rotherham Corporation* (4), supported the presumption that the one year limitation imposed by section 21 of the Limitation Act, 1939, did not apply to the statutory right of contribution and that such an action could be brought even against a public authority at any time within the ordinary six year period.

Whatever be the interpretation placed upon the words " who is or would, if sued, have been liable in " respect of the same damage " it is well settled that in a claim for indemnity or contribution as between co-sureties, the Statute of Limitations does not begin to run until the liability of the surety who seeks contribution has been established.

In *Wolmershausen v. Gullick* (5), the plaintiff was a widow and executrix of a person who with Gullick and three other persons became surety for two large sums of

(1) [1953] 1 All E.R. at 591.
(2) [1953] 2 Q.B. 501.
(3) Ibid 514.
(4) [1921] 1 K.B. 526.
(5) [1893] 2 Ch. 514.

money advanced by a bank to a colliery company of which they were directors. The estate of the deceased was being administered in Court and in 1879 the bank put in a claim for £6,000 alleged to be due on foot of the guarantee. The plaintiff resisted the claim, but in 1890 it was finally allowed for £4,500. Being called upon to pay that sum she sued two of the co-sureties for contribution. One of them was dismissed from the action on the ground that he had carried a composition in bankruptcy and had received his discharge. Counsel for Gullick contended that the plaintiff could not maintain the action until she had paid more than her proportion or at any rate until she had paid her proportion, and also that Gullick was protected by the Statute of Limitations against the bank because no claim had been made against him during the period of limitation, and he was therefore protected against the plaintiff's claim for contribution. Wright J. making a declaration of the plaintiff's right to contribution said as regards the Statute of Limitations: "The principal creditors claim was put in in 1879. "But I think that I must hold that even if the statute "can begin to run before the surety has paid more than "his proportion, at any rate it does not run until his "liability is ascertained, and that did not occur until "1890" (1).

This decision was mentioned with approval by Stirling J. in *Robinson v. Harkin* (2) an action by Robinson one of the trustees of a marriage settlement and three infant children against Harkin the other trustee seeking to make him liable for the loss of a portion of the trust fund. Harkin disputed his liability and in the event of his being held liable counterclaimed contribution from Robinson. The trust fund had been sent by Robinson to Harkin for investment and Harkin had entrusted the whole fund to an outside broker who applied a portion of it to his own use. Stirling J. held that the money was irretrievably lost on September 24, 1888, that Harkin had acted improperly in leaving the fund in the broker's

(1) Ibid. 529. (2) [1896] 2 Ch. 415.

hands and was liable for the loss, but that Robinson was in pari delicto with him and that both were jointly and severally liable to make good the amount of the loss. He also held that the Statute of Limitations afforded no defence and said: "It was held in "*Wolmershausen v. Guillick* (1), that in a case of con- "tribution between two co-sureties time did not begin "to run under the Statutes of Limitations until the "liability of one of the sureties was ascertained—that "is, until the claim of the principal creditor was "established against the surety. I think that the like "principle applies here, and that time does not begin "to run as between the plaintiff Robinson and the "defendant until the claim of the infant cestuis que "trust is established against the latter; and con- "sequently that time only begins to run between them "from the date of the present judgment" (2).

These decisions were approved by the Court of Appeal (Lord Ashbourne C., Fitzgibbon, Barry and Walker L.JJ.) affirming the decision of the Queen's Bench Divisional Court (O'Brien, Johnson and Gibson JJ.) in *Gardner v. Brooke & Others* (3). It was held that the executor of one of several makers of a promissory note whose liability to the creditor had been kept alive beyond six years from the making of the note and who was compelled to pay the whole debt was entitled to sue another maker for his proportion within six years after the time of payment, but outside that period from the making of the note.

Is the principle which applies in cases of contribution as between co-sureties, co-trustees and co-contractors, equally applicable where the parties are tortfeasors, and contribution is claimed under section 16 (1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1951, from a public authority which pleads that the claim is barred by the Public Authorities Protection Act, 1893? The claim for contribution is certainly a proceeding, but is it a proceeding "in "respect of the act neglect or default complained of" in the action? And if the claim for contribution

(1) [1893] 2 Ch. 514.
(2) [1896] 2 Ch. 415, 426.
(3) [1897] 2 I.R. 6, 20.

cannot be brought unless and until the liability of the defendant to the plaintiff has been established, and the defendant is not sued or his liability established within the period of limitation, is the claim for contribution against the public authority thereby defeated ?

These questions were discussed at some length in *Tuckwood v. Rotherham Corporation* (1) a decision of the English Court of Appeal which was mentioned in *Littlewood's* case (2). A carter employed by the plaintiff was leading a horse and cart along a road in which a tramway belonging to and worked by the defendants was laid, when a tramcar driven by a servant of the defendants overtook and collided with the cart and so seriously injured the carter's leg that it had to be amputated. The carter claimed and recovered compensation from the plaintiff as from the date of the accident April 4, 1919, and on December 10, 1919, the plaintiff issued a writ against the defendants claiming an indemnity under section 6 of the Workmen's Compensation Act, 1906, in respect of the payments made to the carter. Under that section the plaintiff had to show that the workman had a right of action for damages for negligence against the defendants, but as the workman's right of action arose on April 4, 1919, more than six months before the issue of the writ, the defendants contended that the action was barred by section 1 of the Public Authorities Protection Act, 1893. The court held that the section did not apply to such a claim.

Bankes L.J. said that in his opinion the claim for the statutory indemnity did not come within the language of the 1893 Act, reading that language in its ordinary sense. " The plaintiff " he said " must establish that " the workman would have been entitled to recover " damage against the corporation for the negligence of " their servant in driving the tramcar. That no doubt " is an essential part of his cause of action ; but I do " not think that it is true to say that the action " claiming the right to the statutory indemnity is an " action in respect of any alleged neglect in the execu-

(1) [1921] 1 K.B. 526. (2) [1953] 2 Q.B. 501.

" tion of a duty within the meaning of the language " used in the section " (1).

Scrutton L.J. regarded the question as one of considerable difficulty arising from the fact that the Act of 1893 was framed in general terms and had to be applied to a large number of cases which were obviously not present to the mind of the Legislature. He said that the claim against the Corporation was not for an act done in execution of an Act of Parliament or of a public duty or authority, or in respect of a neglect in the execution of any such Act duty or authority, that while negligence was one of the ingredients of the liability to indemnify, there were several other ingredients of the liability—namely that the employer had either paid or been compelled by an order to pay the compensation provided by the Act which might be something quite different from the damages which would follow at common law for an act of negligence. He also added that there might be a preliminary proceeding to determine whether the employer was liable to pay compensation, and also a second proceeding between the employer and a sub-contractor, and that it would not be until the sub-contractor had been found liable that he could apply to the person whose servant was guilty of negligence and claim indemnity from him : The proceedings to determine whether the sub-contractor was liable might easily take more than six months and if the defendants' contention was right the person whose servant was negligent would escape because the sub-contractor would not be able to claim an indemnity until the decision of the House of Lords was given.

Atkin L.J. referring to the words " neglect or " default " said : " In this case the alleged neglect or " default in not driving the tramcar with proper skill " gave no cause of action to the plaintiff. He derives " his right to make a claim against the defendants, " not because of their act or default, but because the " Act of 1906 has imposed a liability upon them to " indemnify him if he has had to pay compensation

(1) [1921] 1 K.B. 526, 533.

" to his injured workman by reason of that neglect or " default. So that is doubly removed, if I may say so, " from the act or default. First, the plaintiff has to " rely upon the statutory right to indemnity, and " secondly, he does not acquire that statutory right to " indemnity unless the workman has recovered in- " demnity from him. In view of these considerations, " and in view of the consequences which would follow " from any other construction of the Act it appears to " me that it would be wrong to hold that the Public " Authorities Protection Act applied to a case of this " kind. I find it difficult to believe that the Legisla- " ture can have imposed a limit of six months unless " upon the supposition that a cause of action, which is " prohibited, if it is not brought within the six months, " came into existence at the beginning of the six " months, that is to say, upon the happening of the " neglect or default complained of. If that is the true " view one can understand the Act applying, because " then there is a period of six months during which " proceedings might be taken against the public " authority ; but when an action is brought in respect " of, in one sense, a neglect or default under circum- " stances where no cause of action has arisen during " the six months, and which, if the defendants' con- " tention were correct, would be barred after the " expiration of the six months, it appears to me im- " possible to suppose that the Act passed for the pro- " tection of the public authority, could be so applied " as to defeat any cause of action against the public " authority at all " (1). He then referred to cases in which, if the defendants' contention were correct, the employer would be deprived of the right to an indemnity, for example, where the workman has not obtained an award until after the expiration of six months from the date of the accident or where the workman was so badly injured that he was incapable of making a claim within the six months, and then dies and his dependants then claim compensation. He said that the action was merely brought to recover the statutory indemnity, and although proof of neglect or default was necessary in order to claim the indemnity

(1) [1921] 1 K.B. at 538.

the action was not brought in respect of that neglect or default within the meaning of the Act.

This is the decision of a strong Court of Appeal and although there are parts of the judgments which are relevant only to the special circumstances of a case under the Workmen's Compensation Act, 1906, yet it is based on similar, if indeed not the same, grounds as the decision in *Wolmershausen v. Gullick* (1) and the other cases which followed the judgment of Wright J. in that case. There was no reference to these decisions in *Tuckwood's* case (2), where it should be observed counsel for the plaintiff was not called upon, nor was *Tuckwood's* case (2) cited to Birkett J. or Parker J. in the cases I have mentioned.

We are not bound to follow the English Court of Appeal, but in my opinion the decision in *Tuckwood's* case (2) and the portions of the judgment of Atkin L.J. which I have cited apply *mutatis mutandis* to the present case.

Having regard to the opinion which I have formed it is unnecessary to discuss the question whether the decision of the Irish Court of Appeal affirming the judgment of the Queen's Bench Division in *Gawley v. Belfast Corporation* (3), is overruled by the decision of the Privy Council in *British Electric Railway Company v. Gentile* (4).

In the former case a widow brought an action under the Fatal Accidents Act more than six months after the accident which caused her husband's death, and although the action was brought within the period of limitation fixed by that Act, namely, twelve months, it was held that it was out of time because the Corporation was protected by the Public Authorities Protection Act. *Gentile's* case (4) was an action under the Canadian Families Compensation Act which is somewhat similar in its provisions to the Fatal Accidents Act and the Judicial Committee of the Privy Council held that the period of limitation governing the case was that of twelve months fixed by the

(1) [1893] 2 Ch. 514.
(2) [1921] 1 K.B. 526.
(3) [1908] 2 I.R. 34.
(4) [1914] A.C. 1034.

Compensation Act and not that of six months fixed by the special Act of the Railway Company. In each of these cases the claim was essentially different from a claim for contribution, and I do not think they are of any assistance in the present case.

We are not now called upon to determine the ultimate liability of the third parties, or the meaning of the words referring to a tortfeasor "who is or would "if sued have been liable for the same damage", or whether the Public Authorities Protection Act is a good defence. These are matters for the judge who tries the case.

In my opinion there is a question proper to be tried between the defendants and the third parties and the appeal will therefore be dismissed.

Black L.J.: By section 1 of the Public Authorities Protection Act, 1893, it was enacted that where any action, prosecution or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act duty or authority, the action, prosecution or proceeding shall not be instituted unless it is commenced within six months next after the act, neglect or default complained of. This section is still in force in Northern Ireland with the variation that by the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1951, section 9, a period of twelve months has been substituted for the period of six months.

By section 16 (1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, it is provided, inter alia, that where damage is suffered by any person as a result of a tort, any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would, if sued, have been liable in respect of the same damage. This Act of 1937 did not purport to modify in any way the provisions of section 1 of the Act of 1893, and it gives no

express guidance as to how the protection afforded by the Act of 1893 to public authorities against claims for damages in actions of tort is to be regarded as affected by or is to be harmonized with this provision entitling a tortfeasor liable in respect of damage to recover contribution from another tortfeasor who is, or would, if sued, have been liable in respect of the said damage. The policy of the Legislature in enacting the Act of 1893 was obviously to protect public authorities against claims unless proceedings to enforce those claims were instituted before six months had elapsed. And where an injured party brings an action against a public authority the position still is that the authority is protected against any direct liability to him unless he institutes his proceedings within the present statutory period of twelve months. But if the injured party instead of suing the public authority brings his action against another tortfeasor and succeeds in recovering damages from him, is the public authority still protected against any liability in respect of the damage after the lapse of twelve months from the commission of the tort if no proceedings have been commenced against it in the meantime? Or is the position changed as a result of the provisions of section 16 (1) of the Act of 1937, so that the public authority may now be compelled to make contribution towards damages payable to an injured person although no proceedings have been instituted against it in respect of the matter until more than twelve months have elapsed since the date when the plaintiff sustained his injury?

In the present case the plaintiff's claim against the defendants is in respect of damage caused to his motor car by the negligent driving of a motor lorry on January 2, 1951. The plaintiff did not issue his writ until July 25, 1952. On November 7, 1952, the defendants, with a view to obtaining contribution from the above named third parties under the provisions of section 16 (1) of the Act of 1937, obtained leave to issue and serve a third party notice directed to the third parties and having served this notice applied to the court for directions under Order 16, rule 52. That rule provides that the court upon the hearing of such

an application may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner at or after the trial of the action as the court may direct. On the hearing of the defendants' application the third parties, who are admittedly within the classes protected by the Public Authorities Protection Act, 1893, contended that by reason of the time which had elapsed since the accident they were protected by the provisions of that Act against any claim for contribution sought to be made against them by the defendants under the provisions of section 16 (1) of the Act of 1937. The Lord Chief Justice, however, in a full and considered judgment held that the third parties were not so protected and made an order directing the delivery of pleadings between the defendants and the third parties and ordering that the third parties be at liberty to appear at the trial of the action and take such part as the trial judge should direct and should be bound by the result of the trial and directing that the question of the liability of the third parties to indemnify the defendants or to contribute to any damages payable by the defendants should be tried at the trial of the action or immediately after the trial as the trial judge should direct. The present appeal is from this order made by the Lord Chief Justice.

The question is whether defendants, who may be liable to pay damages on foot of a tort, can sustain proceedings for contribution under section 16 (1) of the Act of 1937 against third parties who are within the protection of the Act of 1893, although no proceedings have been instituted against the third parties either by the plaintiff or by the defendants within twelve months from the occurrence of the act, neglect or default which is the foundation of the plaintiff's claim. The solution of this problem is far from easy. Unfortunately section 16 (1) of the Act of 1937 appears to have been framed without the Legislature having in mind the protection which public authorities enjoyed under the Act of 1893 against claims for damages against

them on foot of alleged neglects and defaults in the execution of their public duties. It is idle to speculate as to what provision the Legislature would have made if their attention had been directed to the matter. Our task is simply to spell out as best we can the meaning and effect of the sections as we find them.

The relevant words of section 16(1) are "Where damage " is suffered by any person as a result of a tort . . . any " tort-feasor liable in respect of that damage may " recover contribution from any other tort-feasor who " is, or would, if sued, have been liable in respect of the " same damage." This wording looks simple enough in itself, but when examined with a view to determining its precise effect it is found to be pregnant with difficulties. The sub-section is copied from section 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935, a statute of the Imperial Parliament. The problem of the precise effect of this sub-section and of its relationship to section 21 (1) of the Limitation Act, 1939, which has replaced in England the provisions of section 1 of the Act of 1893, has given rise to much discussion in the English courts with different judges taking different views. I very much doubt whether it is possible to find any solution of the problem which is entirely satisfactory and convincing. If one could approach the section without reference to the English decisions I should have been disposed to think that it intended that a tort feasor might recover contribution under the section from two possible types of contributor (*a*) from another tortfeasor who is liable in respect of the same damage and (*b*) from a tortfeasor who would have been liable is sued. Type (*a*) would, I think, include on the one hand a tortfeasor who had admitted his liability and on the other hand a tortfeasor who had been held liable, e.g. by having been joined as a defendant along with the tortfeasor seeking contribution in an action brought by the injured party and having had a verdict found against him in those proceedings. If the party against whom contribution is sought is a public authority no difficulty ought to arise if it admitted liability. On the other hand if it had been held liable to the injured party, this must

have been in proceedings brought against it within the statutory period of twelve months. As regards type (*b*), a tortfeasor who would have been liable if sued; I think that the probabilities are that the Legislature is here contemplating a case where an action has been brought by an injured party against only one of two tortfeasors and is providing for a contribution by the other tortfeasor who would have been liable if also sued. I think that it would probably be in accordance with the intention of the Legislature and that it would do less violence than most other suggested constructions to the wording of the section, to hold that "if sued" meant if joined as a defendant in the action brought against the tortfeasor who is seeking contribution. On this construction, if the party against whom contribution is sought is a party protected by the Public Authorities Protection Act, he would be liable to contribute only if the action against the other tortfeasor was commenced within the twelve months. Such a construction would give an intelligible meaning to the curious and obscure phraseology of section 16 (1) (*c*) of the Act of 1937 and would avoid the strange conclusion that while not interfering in any way with the protection afforded by the Act of 1893 to the funds of a public authority, which was solely responsible for a tort, Parliament had by an ambiguous and obscurely worded phrase in a section not referring to that Act virtually swept away this protection in a case where some other party was jointly responsible and where the injured person instead of suing both the public authority and that other party had for some reason chosen to sue that other party alone.

If the construction which I have suggested of section 16 is the correct one, it would follow that in the present case the claim of the defendants to recover contribution against the third party would be statute barred inasmuch as no proceedings of any kind were instituted within twelve months after the accident. Accordingly, if I were satisfied beyond doubt that this is the true effect of the statutory provisions, I would be in favour of allowing the present appeal.

I cannot, however, say that I am satisfied beyond

doubt. As I have already mentioned, the subject has been much discussed in the English courts. In *Merlihan v. Pope* (1), Birkett J. held that in such a case time commenced to run in favour of the third party from the date of the occurrence giving rise to the plaintiff's claim. But the whole weight of subsequent English decision is against this view. The opposite view was taken by Cassels J. in *Hordern-Richmond Ltd. v. Duncan* (2) and by Donovan J. in *Morgan v. Ashmore* (3). And in the recent case of *Littlewood v. Wimpey* (4), the English Court of Appeal have accepted the view that time does not run in favour of a tort feasor who is not a party to the action, but from whom contribution is sought by a defendant, until the defendant's liability is ascertained. The highly unsatisfactory nature of the position is shown by the actual majority decision of the Court of Appeal in *Littlewood v. Wimpey* (4) that the public authority was not liable to make any contribution to the defendants under section 6 (1) of the Act of 1935 because the plaintiff had joined the public authority as actual defendants to the action more than twelve months after the accident, whereas, if the plaintiff had not joined the public authority as defendants at all, the other defendants (Wimpeys) would have been entitled to recover contribution from them under the section.

When a doubtful point has been decided in an particular way by the English Court of Appeal our courts feel a natural hesitation about refusing to follow the English decision. As was said by Holmes L.J. in *McCartan v. Belfast Harbour Commissioners* (5) : " It " is true that, although we are not technically bound " by decisions in the co-ordinate English Court, we " have been in the habit, in adjudicating on questions " as to which the law of the two countries is identical, " to follow them. We hold that uniformity of decision " is so desirable that it is better, even when we think " the matter doubtful, to accept the authority of the " English Court, and leave error, if there be error, to

(1) [1946] 1 K.B. 166.
(2) [1947] 1 K.B. 545.
(3) [1953] 1 All E.R. 328.
(4) [1953] 2 Q.B. 501.
(5) [1910] 2 I.R. 470, 494.

" be corrected by the tribunal whose judgment is final " on both sides of the Channel." This passage was quoted and accepted as a principle to be followed by our own Court of Appeal by Murphy L.J. in *Re Northern Ireland Road Transport Board & The Century Insurance Company Limited* (1). And perhaps this course is especially one to be followed when the matter at issue is not one of any broad legal principle but is really a question as to the construction to be placed upon somewhat obscurely worded statutory provisions.

It should not of course be left out of sight that the alteration which one finds in section 21 of the Limitation Act 1939 from the wording of section 1 of the Act of 1893 may make it easier to hold in England that time does not run in favour of the party from whom contribution is sought until the liability of the party claiming contribution is determined. Section 21 of the Act of 1939 provides that " No action shall be " brought . . . . unless it is commenced before the " expiration of one year from the date on which the " cause of action accrued ", whereas section 1 of the Act of 1893 provides that the action shall not lie or be instituted " unless it is commenced after the . . . " neglect or default complained of ". In the earlier decision, however, of *Tuckwood v. Rotherham Corporation* (2), a strong Court of Appeal held that the action for an indemnity conferred by section 6 (2) of the Workmen's Compensation Act 1906, upon an employer who has had to pay compensation in respect of an injury caused under circumstances creating a legal liability in some other person to pay damages was not a proceeding to which the Public Authorities Protection Act would apply as it was not an action brought in respect of an alleged neglect or default in the execution of an act, duty or authority but was an action brought under a right of indemnity created by statute. In *Littlewood's* case (3) both Denning L.J. and Morris L.J. cite *Tuckwood's* case (2) as an established authority for the proposition that an action to enforce a right of indemnity or contribution given by

(1) [1941] N.I. 77, 107.
(2) [1921] 1 K.B. 526.
(3) [1953] 2 Q.B. 501.

statute is not an action in respect of an alleged neglect or default in the execution of a duty.

It must not be overlooked that the order against which the present appeal is brought is an interlocutory order of the Queen's Bench Division and that accordingly no appeal will lie from the decision of this Court on the appeal: *Gosford v. Irish Land Commission* (1). If the view which appears now to be accepted by the English Court of Appeal is to be challenged and become the subject of express decision by this court. I should prefer that this should be done in proceedings in which the matter can be reviewed in the House of Lords, and if the legal position is in doubt it is obviously far preferable that the issue between the defendants and the third parties, so far as it is an issue of fact, should be tried out at the trial of the action when all the parties are before the court rather than that it should be left to be tried in separate proceedings between the defendants and the third parties. Accordingly, I am of opinion that the better course is that no definite ruling as to the effect of s. 16 (1) of the Act of 1937 upon the provisions of the Public Authorities Protection Act should be given by this court upon the present interlocutary application but that the order made by the Lord Chief Justice should be affirmed on the ground that there is within the meaning of Or. 16, r. 52 a question proper to be tried as to the liability of the third parties to make contributions. This course will not preclude the third parties from raising, in their defence, a plea based upon the Public Authorities Protection Act and it will then be possible to carry this issue, if so desired, to the highest tribunal. It is to be noticed that in *Merlihan v. Pope* (2), the decision of Birkett J. in favour of the third party, the point was not raised on an interlocutory application but was argued between the defendants and the third party after the issue between the plaintiff and the defendants had been decided.

In conclusion I trust that it may not be considered presumptuous of me to express a hope that now that

(1) [1899] A.C. 435. (2) [1946] 1 K.B. 166.

some of the real difficulties arising from the wording of section 16 of the Act of 1937 have been exposed, Parliament may find it possible to assist the courts in the future by an amending Act indicating more clearly to what exact extent (if at all) it really desires that the protection given to Public Authorities by the Act of 1893 should be affected by the right of contribution between tort feasors introduced by the Act of 1937.

Curran J.: The judgments just read demonstrate the difficulties encountered in various types of cases in reconciling the provisions of the Public Authorities Protection Act, as amended, with the provisions of subsequent statutes where a right of action is given in general terms without express reference to the protection given in the first mentioned statute to persons acting in the execution of statutory and other public duties. A careful consideration of reported cases does not resolve for me the problem that arises in the present application. In these cricumstances I seek a solution to the problem in the relevant statutory provisions themselves.

The plaintiff did not join the third parties as defendants. If they were guilty of any neglect or default they could have been so joined provided the proceedings had been instituted within twelve months next after the neglect or default complained of. In fact the date of the alleged neglect or default was January 2, 1951, and the writ was not issued until the July 25, 1952. Had the plaintiff joined the third parties as defendants it is common case that they could have successfully pleaded the Public Authorities Protection Act. The question is whether, by reason of the plaintiff's delay in instituting proceedings, the defendants have lost their right to contribution from the third parties.

If the proceedings by the defendants against the third parties to recover contribution are in respect of any alleged neglect or default in the execution of any Act of Parliament or of any public duty or authority,

within the meaning of the Public Authorities Protection Act, the defendants are out of time and the third parties are protected by the Act. It is conceded that had the plaintiff instituted his proceedings in time and had joined the present third parties as defendants such proceedings would have been in respect of an alleged neglect or default within the meaning of the Act ; and it is clear from the provisions of section 1 (*c*) of the Act that this is so even where the proceedings is not an action for damages.

Thus *any* right of action vested in the plaintiff in respect of the said alleged neglect or default would be barred by the statute. The basis of the proceedings is a breach of a duty to take care owed by the defendants to the plaintiff.

If the defendants sought to make the third parties liable on the basis of a breach of a duty to take care owed by the third parties to the defendants such a claim would be out of time and would be barred by the statute. It would clearly be in respect of an alleged neglect or default or in other words a breach of a duty to take care. This is not what the defendants seek. There is no question of any breach of a duty to take care owed by the third parties to the defendants. The proceedings are to enforce a right to recover contribution because both the defendants and the third parties have been guilty of some neglect or default towards the plaintiff. No doubt the defendants must prove such neglect or default by the third parties and in that sense the proceedings might appear to be " in respect of " such neglect or default within the meaning of the Public Authorities Protection Act. But in my view the words of the Act should not be interpreted in such a loose sense. I am of opinion that proceedings in respect of an alleged neglect or default are proceedings by a person towards whom the persons proceeded against had a duty to take care and for a breach of such duty. If I am right in this view it follows that as that element is missing from the proceedings by the defendants against the third parties to recover contribution under section 16 (1) (*c*) of the Law

Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, the third parties are not protected by the Public Authorities Protection Act and the appeal should therefore be dismissed.

Appeal dismissed.

Solicitors for the defendants : *Wray & Telford.*

Solicitors for the third parties : *J. F. Fitzpatrick & Co.*

J.P.

WALSH v. CURRY AND OTHERS (1).

Negligence—Contribution between tortfeasors—Cause of action against one tortfeasor abandoned by plaintiff—Any tortfeasor "liable . . . "or would if sued have been liable"—Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937 (1 Edw. 8 & 1 Geo. 6 c. 9) s. 16 (1) (c).

By section 16 (1) (*c*) of the Law Reform (Miscellaneous Provisions) Act, (Northern Ireland), 1937, "any tort-feasor liable . . . may recover contribution from any other tort-feasor who is, or would, if sued, have been, liable in respect of the same damage . . ."

A workman employed by A was travelling to work in A's lorry, which was driven by B, when he was killed in an accident involving another lorry owned by C and driven by D. The plaintiff as administratrix of the deceased sued A, B, C and D, and her writ alleged negligent driving as against each defendant, and as against A further alleged negligence in failure to provide a safe means of transport. At the trial the jury found that B was not negligent in the driving of A's lorry but that D was negligent in the driving of C's lorry. The alleged negligence of A in failing to provide a safe means of transport had not been pursued in the statement of claim, but at the trial, at the instance of C and D, a question on this point was put to the jury which found that A was guilty of negligence by overloading his lorry. The plaintiff thereupon sought leave to amend her statement of claim to include the issue of overloading. The trial judge refused leave to amend, but he gave judgment against A as to one-third and against C and D as to two-thirds, the judgment against A being on the basis that by reason of the finding on overloading A was liable to make contribution under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, as another tortfeasor "who is, or would, if sued, have been, liable in respect of the same damage."

Held, by the Court of Appeal (Lord MacDermott L.C.J., Porter and Black L.JJ.), (i) that the plaintiff was not entitled to judgment against A as the negligence in overloading found against A was not an issue raised in the action between the plaintiff and A; (ii) that C and D had no claim to contribution against A since A had been sued and been held not liable, notwithstanding that in an action with the issue of overloading properly raised he would have been liable.

Wimpey (George) & Co. Ltd. v. British Overseas Airways Corporation [1955] A.C.169 considered.

APPEAL from a judgment entered against the appellant in an action tried by Sheil J. with a special jury.

(1) In the Court of Appeal before Lord MacDermott L.C.J., Porter and Black L.JJ.: June 21, 22, 24, 1954; Jan. 28, 1955.

The following statement of facts is taken from the judgment of the Lord Chief Justice.

On November 10, 1951, Edward Walsh, the husband of the plaintiff, sustained injuries which caused his death in a highway accident on a second-class road leading from Strabane to Victoria Bridge in the County of Tyrone. The circumstances of this accident were that Edward Walsh, the deceased, was being taken to his work in a 30-cwt. motor lorry owned by his employer, Frederick Hamilton Wallace the second defendant, and driven by Alexander Curry the first defendant and Wallace's servant. The carrying platform of the lorry appears to have had low sides and placed within these was a wooden framework which was covered with canvas and had the effect of closing in the platform so as to afford shelter from the weather to anyone travelling thereon. On the day concerned some twenty employees of the second defendant, including the deceased, were being carried under this canopy. Most of them were seated on two forms, each of which ran from front to rear of the lorry and close to one of its sides. The deceased was sitting on the form on the offside. Those who were sitting on these forms would normally have their backs and heads against or close to the canvas sides of the canopy. If they leaned back or were pushed against the canvas by the movement of the vehicle the canvas would "give" or bulge outwards to an extent of some inches and so that the protrusion projected over and beyond the side of the lorry. It was quite clear that part of the deceased's body had been projecting in this way when he received his injuries. These were inflicted by a lorry coming in the opposite direction which was owned by George Gregg & Sons, Ltd., the fourth defendant, and driven by its servant, Alphonsus Edward Graham, the third defendant. As the lorries were passing they touched and the offside of the canopy of Wallace's lorry was ripped by some projection on Gregg's lorry. The only possible inference from the evidence is that the part of the canopy which was ripped was a part which was bulged outwards in the manner already described. The road at

the scene of the collision was straight and each of the drivers had had a clear view of the other's lorry for a considerable distance.

On July 17, 1952, the plaintiff, suing as the administratrix of her husband, issued a writ claiming damages for his death under the Fatal Accidents Acts, 1846-1908, and also under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937. The indorsement on the writ alleged that the death of Edward Walsh was occasioned " (i) by the negligence of the " second named defendant his servants and agents " (including the first named defendant) in the driving, " control and management of a motor lorry and in " failing to provide safe means of transport and a safe " system of work ; and further and in the alternative " (ii) by the negligence of the third named defendant as " servant and agent of the fourth named defendant " in the driving control and management of a motor " lorry." The claim, therefore, alleged negligence against both drivers and sought to hold their respective masters vicariously responsible for that negligence. In addition, it alleged against Wallace, the second defendant and the deceased's employer, a different kind of negligence which was personal rather than vicarious in nature and based on a breach of the duty resting on an employer to take reasonable care for the safety of his workmen.

The statement of claim was delivered on October 3, 1952. It amplified the allegations of negligence against the respective drivers as the servants or agents of the second and fourth defendants, but it did not pursue the additional allegation of personal negligence against the second defendant as the employer of the deceased. The statement of claim did not refer to this head of negligence at all, not even to the extent of alleging that the deceased was in the employment of the second defendant, and it appeared from the judgment of the learned trial judge that this omission was deliberate and not inadvertent.

The first two defendants duly filed a joint defence denying the material averments in the statement of claim and the third and fourth defendants did likewise.

These two groups of defendants also served third party notices on each other. This was done after delivery of the statement of claim, but the grounds of the plaintiff's claim were set out in each of the notices according to the indorsement on the writ. Then, on February 24, 1953, all parties entered into a written consent agreeing that the question of the liability of the first and second defendants and also of the third and fourth defendants to make the contribution or indemnity claimed by their respective third party notices be tried in such manner at or after the trial of the action as the trial judge might direct.

The trial took place before Sheil J. and a special jury on July 28, 29 and 30, 1953. The plaintiff did not seek to show that the second defendant, Wallace, had failed to provide safe transport or a safe system of work, but the allegation that Wallace's lorry had been overloaded and was not a safe means of transport was strongly pursued on behalf of the third and fourth defendants. The issues respecting liability to the plaintiff and contribution between the defendants were dealt with together and the questions left to the jury on these issues with the answers thereto were, in so far as material to this appeal, as follows :—

" 1. Was the defendant Alexander Curry guilty " of negligence in the driving or management of " a motor lorry ?
" Answer : *No.*

" 2. Was the defendant Frederick Hamilton " Wallace guilty of negligence in causing or permitting the overloading of the said defendant's " motor lorry ?
" Answer : *Yes.*

" 3. Was the defendant Alphonsus Graham guilty " of negligence in the driving or management of a " motor lorry ?
" Answer : *Yes.*

" 4. If the answers to any of the above questions " be ' Yes ' to what damages is the plaintiff entitled " under :—
" (*a*) Law Reform Act (Northern Ireland), 1937 ?
" Answer : £29 10s. 0d.

" It is agreed this figure should be £29 10s. 0d.
" (*b*) The Fatal Accidents Acts ?
" Answer : £4,450.
" 5. If more than one defendant was negligent,
" what amount of the damages should be paid by
" each of them ?
" Answer : *F. H. Wallace* ⅓*rd*—33⅓*rd per cent.*
A. Graham ⅔*rds*—66⅔*rds. per cent.*"

After discussion on these findings the trial stood adjourned and was eventually relisted for argument on December 17, 1953. At that hearing counsel for the plaintiff sought liberty to amend the statement of claim by adding an allegation of negligence against the second defendant in failing to provide safe transport. The learned judge reserved his decision on this and the other points argued until January 29, 1954, when he, (i) refused the plaintiff's application for leave to amend ; (ii) gave judgment for the plaintiff against the second, third and fourth defendants ; (iii) gave judgment for the first defendant against the plaintiff ; and (iv) ordered that the damages and costs awarded to the plaintiff be found as to one-third thereof by the second defendant and as to the remaining two-thirds by the third and fourth defendants.

Wallace, the second defendant, appealed to the Court of Appeal asking that judgment should be entered for him as against the plaintiff and that he should be exonerated from liability to pay one-third or any part of the damages and costs.

Jones Q.C. and *Lowry* for the appellant.

There was no evidence worthy of consideration that the appellant was guilty of overloading. The fact that the jury found the driver of Gregg's lorry two thirds to blame leads one to ask to what extent the evidence that Wallace's lorry was swaying and bulging was adequate to ground the allegation that Wallace should have foreseen that the loading was likely to cause an accident. It illustrates the old difference between conjecture and reasonable inference.

On the issues as disclosed on the pleadings the plaintiff could not be entitled to judgment against the

appellant. While the question of unsafe transport was raised in the writ it was abandoned in the statement of claim, and no attempt was made by the plaintiff at the trial of the action to have the pleadings amended. The plaintiff can only be entitled to judgment on the issues which appear on the statement of claim : *Gautret v. Egerton* (1). Cases must be decided on the issues on the record : *Blay v. Pollard* (2). The fact that a question was put to the jury at the request of another defendant does not make an issue on the record between the plaintiff and ourselves, with the result that there is nothing upon which the judgment can operate.

Section 16 (1) (*c*) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, contemplates a person who is liable to the plaintiff, or a person who would, if sued, have been liable to the plaintiff. We have been sued in respect of the damage complained of and have been found not liable. The effect of the section may not be what Parliament intended but it is not the function of the court to amend it : *Magor and St. Mellons R.D.C. v. Newport Corporation* (3). The position is very similar to that in *Littlewood v. George Wimpey & Co., Ltd. and British Overseas Airways Corporation* (4). In that case Wimpeys could have got contribution if the Corporation had not been sued, but having been sued it was not within the scope of tortfeasors contemplated by the section. The court had before it the consideration of the unfair result and the supposed intention of Parliament, but the majority refused to read words into the section so as to alter the meaning.

McSparran Q.C., *Nicholson Q.C.* and *Babington* for the respondents.

(1) (1867) L.R. 2 C.P. 371.
(2) [1930] 1 K.B. 628.
(3) [1952] A.C. 189, 190.
(4) [1953] 1 W.L.R. 426 ; [1953] 2 Q.B. 501.

[At the time of the hearing this case had not been heard on appeal to the House of Lords.].

Though not alleged in the statement of claim the issue of overloading was raised at the hearing and the parties are bound by the course of the trial : *Kennan v. Murphy* (1) ; *Russell v. Moore* (2). In a jury trial it is the real issue and not the formal issue which matters. *M'Bride v. Collen Bros.* (3).

The appellants are not entitled to say that they have been sued and found not liable. Res inter alios acta is not res judicata : *Hunter v. Stewart* (4). In this case there is no common denominator at all as it involved separate acts of different natures giving rise to separate causes of action. In the one respect the appellant's responsibility was vicarious and in the other direct. The principle of res judicata was considered by Slesser L.J. in *Marginson v. Blackburn Borough Council* (5). In an action on the case as well as in an action of trespass, the cause of action is the wrongful act or default of the defendant and not the damage caused thereby : Smith's Leading Cases Vol. 1, p. 521.

The appellant relies on the majority decision in *Littlewood's* case (6). In that case the Court of Appeal upheld the decision of Parker J. who was of the opinion that " sued " in the section meant " sued to judgment." If the decision in that case is correct the section contemplates, (*a*) the case where both defendants are sued and found liable and (*b*) the case where the plaintiff does not sue the second possible defendant. If a defendant who is sued can satisfy the court that another tortfeasor would, if he had been sued, have been liable, then he is entitled to contribution against that other tortfeasor.

Agnew Q.C. and *Conaghan* for the plaintiff in the action.

Cur. adv. vult.

LORD MACDERMOTT L.C.J. after stating the facts as set out above : I do not think the evidence discloses any strong case against the second defendant as

(1) (1880) 8 L.R. Ir. 285, 295.
(2) (1880) 8 L.R. Ir. 318.
(3) (1905) 39 I.L.T.R. 165.
(4) (1861) 4 De G. F. & J. 168.
(5) [1939] 2 K.B. 426
(6) [1953] 1 W.L.R. 426; [1953] 2 Q.B. 501.

respects overloading or the failure to provide a reasonably safe means of transport for his workmen. But I am of opinion that it is impossible to say that it does not contain sufficient to entitle the jury to arrive at the answer they gave to question No. 2. There was evidence that Wallace's lorry was swaying on its springs as it approached Gregg's lorry and I think there was enough in the material placed before the jury to justify them in connecting this with the carrying of twenty men on the platform of a 30-cwt. lorry and in concluding that the manner in which they were carried made it likely that some part of their bodies would project beyond the side of the vehicle and be therefore more vulnerable when passing other vehicles than if altogether contained within the dimensions of the lorry. The question is not whether this court would have given the same answer to question No. 2 as the jury. It is whether twelve reasonable men could have arrived at the answer given on the material offered for their consideration. I find it impossible to say that they could not have done so.

The second ground of appeal raises two questions—(i) should judgment have been entered for the plaintiff against the second defendant? and (ii) if not, should the second defendant be held liable to contribute any part of the damages and costs payable to the plaintiff?

The answer to question (i) seems to me clear enough if an opinion can be formed from the pleadings and the manner in which the plaintiff's case was presented. Judgment has been given against the second defendant on the ground that he negligently caused or permitted the lorry in which the deceased was being conveyed to his work to be overcrowded. That as a cause of action would have been within the indorsement on the writ, but the plaintiff elected not to pursue it. As already noted it is not pleaded in the statement of claim and no effort was made on behalf of the plaintiff to set it up at the trial. If that were all, it would seem to me that question No. 2 as left to the jury was not an issue between the plaintiff and the second defendant, and that, on the answer given by the jury to question No. 1, the second defendant would have

been entitled to judgment against the plaintiff. This is not to say that the issues of fact need always be framed as pleaded. Sometimes, for example, it happens during the course of a trial that an aspect of the cause of action alleged emerges or is revealed as the real issue though it has not been particularised in the pleading. When this occurs the trial judge should have the issue thus arising determined unless to do so will work an injustice or make for an unfair hearing; and having done so he should, if practicable, have the pleadings amended to conform with the issues determined. But the present is not a case of that sort. The personal negligence respecting the provision of safe transport which was alleged against the second defendant only to be abandoned, was in quite a different category from the negligent driving of the lorry which was alleged against his servant. Each allegation was based on a duty arising from a different relationship and neither was in any sense a particularisation of the other. As long as the present system of pleading prevails I see no escape from the conclusion that the second defendant should have had judgment against the plaintiff. But that, as I have indicated, is looking only to the pleadings and the manner in which the plaintiff's case was conducted. Is there, then, anything else in the suit to justify a different conclusion? I do not think there is. The learned judge states that the questions for the jury as drafted by him were agreed. If there had been no issue for decision between the two groups of defendants this might have settled the question under discussion against the appellant; but the existence of the cross claims for contribution in my opinion puts quite a different complexion on the matter. The course of events at the trial satisfies me (*a*) that the plaintiff agreed to the questions for the jury on the basis that question No. 2 concerned the defendants inter se, and (*b*) that the defendants took a similar view. The third and fourth defendants had no other view to take and it appears that counsel for the first and second defendants made the point that question No. 2 raised no issue between his clients and the plaintiff. The fact that

at a much later stage the plaintiff applied for an amendment of the statement of claim so as to take advantage of the jury's answer to question No. 2 does not seem to me to affect the position. The application was obviously an afterthought, and in any event it was refused.

For these reasons I hold that the plaintiff was not entitled to judgment against the second defendant and that judgment should now be entered for him against the plaintiff.

This brings me to question (ii). Are the third and fourth defendants as tortfeasors entitled to recover contribution from the second defendant on the strength of the jury's answer to question No. 2 and notwithstanding that the plaintiff's action against him has failed ? This turns on the true construction of section 16 (1) (*c*) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, which, omitting what is not material, reads as follows :

> " 16.—(1) Where damage is suffered by any person " as a result of a tort—
>
> "(*c*) any tort-feasor liable in respect of that damage " may recover contribution from any other " tort-feasor who is, or would, if sued, have " been, liable in respect of the same damage."

In the argument on the meaning of this difficult enactment the decision of Parker J. and the Court of Appeal in England in *Littlewood v. George Wimpey & Co., Ltd. and British Overseas Airways Corporation* (1), on the identical English provision (section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935) was much canvassed, and as that case was then under appeal to the House of Lords we thought it well to defer our determination of the present appeal until the conclusions of their Lordships had been published. This has now been done and the decision of the Court of Appeal has been affirmed sub nom. *George Wimpey & Co., Ltd. v. British Overseas Airways Corporation* (2).

(1) [1953] 1 W.L.R. 426; [1953] 2 Q.B. 501.

(2) [1955] A.C. 169.

The facts of this much debated case may be shortly stated. Littlewood, the plaintiff, was injured on July 28, 1949, in a collision between a vehicle owned by his employers, The British Overseas Airways Corporation (hereinafter referred to as "B.O.A.C."), and a vehicle owned by George Wimpey & Co., Ltd. (hereinafter referred to as "Wimpeys"). On April 26, 1951, he sued Wimpeys for damages. They denied negligence and served a third party notice on B.O.A.C. claiming contribution. Littlewood then added B.O.A.C. as defendants. They defended the case on the merits and also relied, as a public authority, on section 21 of the Limitation Act, 1939. Parker J. (as he then was) held Wimpeys two-thirds and B.O.A.C. one-third to blame for the damage suffered, but he gave judgment for the plaintiff against Wimpeys alone on the ground that B.O.A.C. as a public authority were entitled to the protection of the Limitation Act, and he thereupon dismissed Wimpeys claim for contribution against B.O.A.C. He did this being of opinion that on its true construction section 6 (1) (*c*) of the English Act of 1935 makes a distinction between a person who has been sued to judgment and a person who has not been so sued, and that as B.O.A.C. had been sued to judgment, albeit unsuccessfully, Wimpeys were not entitled to rely upon that part of the enactment which says—"or would, if sued, have been, liable in respect "of the same damage." In the Court of Appeal Denning L.J. dissented from this interpretation, but Singleton and Morris L.JJ. agreed with it and the appeal was dismissed. In the course of his judgment Singleton L.J. says (1): "I find difficulty in treating "a tortfeasor who has been sued as though he had not "been sued. And I find still greater difficulty in "treating such a tortfeasor as one who would have "been liable if he had been sued when he is sued in the "action and is held not to be liable. I cannot see "how a judge who has held that a defendant is not "liable can immediately thereafter say that he would "have been liable if he had been sued." Morris L.J.

(1) [1953] 2 Q.B. at 510.

states his view on the point of construction in the following terms (1): "The words 'would, if sued' "appear to me to postulate the case of someone who "has not been sued. In the case of such a person who "has not been sued the inquiry becomes whether he "would, if he had been sued, have been 'liable'. It "seems to me that in this context the word 'liable' "must mean 'held liable' or sued to judgment. Con- "tribution may therefore be recovered from (*a*) "another tortfeasor who is liable; or (*b*) another "tortfeasor who has not been sued, but who, if he had "been sued, would have been liable." The House of Lords affirmed the decision of the Court of Appeal. This was a majority ruling, Lord Simonds, Lord Reid and Lord Tucker taking the view that the appeal of Wimpeys should be dismissed and Lord Porter and Lord Keith of Avonholm being of the contrary opinion. Lord Simonds adopted the construction which had found favour in the Court of Appeal. The following passage from his speech states the case for this interpretation in, if I may say so, the clearest of terms. He says (2): "The question then can be simply stated. "Contribution is recoverable from one who in an "actual suit by the injured man has been held liable "by judgment: it is recoverable from one who, if "sued, would in that hypothetical suit have been held "liable. Is it also recoverable from one who has been "actually sued by the injured man and held not "liable? It happens in the case under appeal that "the reason why the party from whom contribution "was claimed was held not liable was because the "Limitation Act was successfully pleaded. But this "is irrelevant to the issue. The same question would "arise if the claimant tortfeasor alleged that the "defence, though it succeeded on the merits, was "successful only because the case had been inade- "quately presented or even because the judge or jury "had taken a wrong view of it. It appears to me that "a construction leading to such a result should only "be accepted if the language fairly admits of no other

(1) [1953] 2 Q.B. at 523. (2) [1955] A.C. at 178.

" meaning. But, so far from this being the case, in " my opinion the subsection plainly contemplates two " classes only of persons from whom contribution can " be claimed, viz. : those who have been sued and " those who have not been sued but would, if sued, be " held liable. If the intention had been to include a " third class of persons who, having been already sued " and found not liable, might yet in hypothetical pro- " ceedings be sued a second time and then found liable " (an extravagant intention, as it appears to me, to " impute to the legislature) I should have expected to " find it expressed in clear and appropriate language. " Not only is it not so expressed, but on the contrary " I find in the words actually used the clear indication " that the class of persons who ' if sued would have " ' been liable ' does not include persons who, having " been sued have been held not liable. As Morris L.J. " aptly puts it, the words ' if sued ' ' postulate the case " ' of someone who has not been sued '."

The opinion of Lord Tucker was founded on the same view of the meaning of section 6 (1) (*c*). Lord Reid arrived at the conclusion that the appeal should be dismissed for a different reason. His opinion is directed to ascertaining the temporal connotation of the words " if sued ". He held that these words referred either to the time when action was taken against the tortfeasor claiming contribution or else to the time when that tortfeasor claimed contribution, and that the appeal must therefore fail because at either of these times Littlewood's claim against B.O.A.C. was statute barred. Lord Porter and Lord Keith of Avonholm dissented from the construction favoured by the majority in the Court of Appeal and by Lord Simonds and Lord Tucker, and also from Lord Reid's conclusion as to the temporal connotation of the words " if sued ". In these circumstances I do not think it can be said that the view taken by Singleton and Morris L.JJ. in the Court of Appeal has been adopted by the House of Lords so as to be binding upon this court, for although the House of Lords affirmed the decision of the Court of Appeal, which was based on that view, the view itself did not find

favour with the majority of the Law Lords. I say this because I have no doubt from what Lord Reid says that he did not share the view taken by Lord Simonds and Lord Tucker. If, however, the construction adopted by the majority in the Court of Appeal has not been conclusively established by the House of Lords, I do not think it is possible to say that it has been rejected, for so to hold would be to reckon the views of the minority on which their dissent was founded.

For these reasons I think this court is in a position to form its own judgment on the matter in the light, of course, of the opinions evoked by *Wimpey's* case (1). Having given the problem my best consideration I have come to the conclusion that the construction to be preferred is that adopted by Parker J. at first instance, by Singleton and Morris L.JJ. in the Court of Appeal and by Lord Simonds and Lord Tucker in the House of Lords. While keeping open a subsidiary point on the ambit of the word " sued " which I shall mention in a moment, I respectfully agree with the general reasoning of those I have named on this subject and would only add that a person who has by a process of adjudication been fully exonerated from liability in respect of the damage suffered by another as a result of a tort seems to me to be no longer within the policy of the enactment. To distinguish, in this connection, between a defence on the merits and one based on some technical plea, such as diplomatic immunity or a statutory limitation, would be to ask of the language used by the legislature more than it can fairly bear, and would, I think, probably produce as many anomalies as it would avoid.

Coming back to the circumstances of the present appeal I should first of all make it clear that, as at present advised, I would not regard the construction of the subsection which I have adopted as necessarily ruling the case in favour of the appellant if the writ had omitted to allege against him a negligent failure

(1) [1953] 1 W.L.R. 426;
[1953] 2 Q.B. 501;
[1955] A.C. 169.

to provide a safe means of transport. In that event he would still, of course, have succeeded on the answer of the jury to question No. 1. But I doubt (though I do not need to decide the point) if this would have precluded the plaintiff from suing him subsequently on the omitted cause of action. And if that were the position, it may be that the words of the subsection, "if sued," could be regarded as postulating, not only the case of someone who had not been sued at all, but also the case of someone who had not been sued so as to conclude the question of his liability. That point, however, did not call for consideration in *Wimpey's* case (1). Nor does it, in my opinion, arise on the facts here. The writ was indorsed comprehensively and the plaintiff having abandoned one cause of action cannot sue again on foot of it. The present suit has conclusively decided the question of the appellant's liability in his favour and, that being so, section 16 (1) (*c*) of the Act of 1937, on my view of it, gives no right of contribution against him.

I would, accordingly, allow the appeal.

PORTER L.J. : The jury found that the accident was caused by two independent acts of negligence, viz. (*a*) the negligence of the appellant Wallace in causing or permitting the overloading of his motor lorry, and (*b*) the negligence of the third named defendant in the driving and management of a motor lorry the property of George Gregg & Sons, the fourth named defendants. Having regard to the finding of the jury that Curry, the driver of the appellant's lorry, was not negligent in the driving or management of the lorry, we must assume that he was driving carefully on his own side of the road which was approximately 17 or 18 feet wide. It is therefore clear that if Graham had been driving his lorry on his proper side there would have been a clearance of two or perhaps three feet between the lorries as they were passing and in all probability there would have been no accident.

(1) [1953] 1 W.L.R. 426 ;
[1953] 2 Q.B. 501 ;
[1955] A.C. 169.

The contention of the appellant is that there was no evidence or no proper evidence to support the finding of the jury against him.

[His Lordship reviewed the evidence and continued]: I am of opinion that on this evidence it is impossible to say that the jury might not reasonably have come to the conclusion that the lorry was crowded and overloaded, and that it was swaying on its springs owing to the number of the men who were crowded in it, and that it was this swaying which caused the canvas and the head of the deceased man Walsh to project so far over the body of the lorry as to encounter the impact of the hook or pin of Gregg's lorry which at that moment was too far out from its own proper side of the road so that there was not sufficient clearance between the lorries.

The next question arises on the pleadings. One of the several causes of action set out in the indorsement on the writ was the failure to provide safe means of transport and a safe system of work, but it was not included in the particulars in the statement of claim, and, as the learned trial judge says in his notes: "This was not done per incuriam, for counsel who "drafted it for the plaintiff told me during argument "he had adverted to the matter but had thought it "right to omit these allegations". Nor was any allegation of overloading made by plaintiff's counsel at the trial, and it was only because the matter was so strongly pressed by counsel for the third and fourth named defendants that it was left to the jury. Moreover, no objection was made by counsel for the plaintiff to Mr. Lowry's submission that overloading was not an issue between the plaintiff and the appellant. It was not until after the jury had answered the questions and Mr. Lowry had asked for judgment for the appellant against the plaintiff, indeed it was not until the adjourned hearing of the case, that counsel for the plaintiff sought to have the particulars of the statement of claim amended by adding the failure to provide and maintain safe transport and the overcrowding of the lorry. The learned trial judge said that there was no need to add to the particulars and also that he did

not think that he should at that stage have given leave to amend, but he decided that the plaintiff was entitled to judgment against the appellant under section 16 (1) (*a*) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937.

I do not think that section 16 (1) (*a*) applies to this case. The object of this provision was to annul the common law rule that a judgment obtained against a joint tortfeasor released all the others even though it was not satisfied. The tort was held to be merged in the judgment : *Brinsmead v. Harrison* (1).

Section 16 (1) (*a*) is as follows : " (1) Where damage " is suffered by any person as a result of a tort (whether " a crime or not)—(*a*) judgment recovered against " any tort-feasor liable in respect of that damage shall " not be a bar to an action against any other person " who would if sued have been liable as a joint tort- " feasor in respect of the same damage ". Now persons are not joint tortfeasors merely because their independent wrongful acts resulted in one damage. In this case there was neither common design nor concerted action, but "independent negligences accid- " entally resulting in one damage " : *The Koursk* (2), per Scrutton L.J.

The appellant has been found to be a tort-feasor, but he is not a person who would, if sued, have been liable as a *joint tortfeasor*. Section 16 (1) (*a*) does not apply, and since overloading was not an issue between the plaintiff and the appellant, and was in fact deliberately omitted by plaintiff's counsel in drafting the statement of claim, the judgment against the appellant must be set aside.

I think that the amendment could and should have been made, if application to amend had been made at the proper time, which was when it became obvious that the charge of overloading was being strongly pressed by counsel for the third and fourth named defendants against the appellant. As it happened the application was made too late and I think the learned trial judge was right in refusing liberty to amend. Cases must be

(1) (1872) L.R. 7 C.P. 547. (2) [1924] P. 140, 156.

decided on the issues raised by the pleadings, and if any other issue is to be tried it must be placed on the record by amendment of the pleadings: *Blay v. Pollard* (1). In *London Passenger Transport Board v. Moscrop* (2), Lord Russell of Killowen puts the matter as follows: "Any departure from the cause of action "alleged, or the relief claimed in the pleadings should "be preceded, or, at all events, accompanied, by the "relevant amendments, so that the exact cause of "action alleged and relief claimed shall form part of "the court's record, and be capable of being referred "to thereafter should necessity arise."

The question of contribution by the appellant arises under section 16 (1) (*c*) which is as follows: "any "tort-feasor liable in respect of that damage"—that is to say the damage suffered by any person as the result of a tort—"may recover contribution from any "other tort-feasor who is, or would, if sued, have been, "liable in respect of the same damage, whether as a "joint tort-feasor or otherwise." The language is exactly the same as that of section 6 (1) (*c*) of the English Law Reform (Married Women and Tort-feasors) Act, 1935. Different opinions as to the meaning of the words have been expressed by a number of English judges. The latest decision is a majority decision (three to two) of the House of Lords in *Wimpey (George) & Co., Ltd. v. British Overseas Airways Corporation* (3), affirming the majority decision (two to one) of the Court of Appeal sub nom *Littlewood v. George Wimpey & Co., Ltd. & British Overseas Airways Corporation and British Overseas Airways Corporation (Third Party)* (4) which affirmed the decision of Parker J.

I think there is much to be said for the interpretation put upon the paragraph by Denning L.J. in the Court of Appeal and Lord Porter and Lord Keith in the House of Lords, viz., that any tortfeasor who is liable is entitled to recover contribution from any other tortfeasor who was implicated in the tort. According

(1) [1930] 1 K.B. 628.
(2) [1942] A.C. 332, 347.
(3) [1955] A.C. 169.
(4) [1953] 2 Q.B. 501.

to this interpretation the appellant, having been found to be guilty of negligence in causing or permitting the overloading of the lorry, would be liable to make contribution, although he was sued and found not guilty of negligence in the driving and management of the lorry. The majority of the House of Lords, however, took a different and a narrower view of the scope of the paragraph and in particular of the meaning of the words "who is, or would, if sued, have been, liable".

Lord Tucker in *Wimpey's* case (1) said: "I understand that all your Lordships agree with the trial judge and the majority of the Court of Appeal that the word 'liable' where it appears for the second time in paragraph (*c*) must owing to the presence of the words 'would if sued have been' mean 'held liable'", and he added that he agreed.

Now a tortfeasor may escape liability for the damage he has caused in various ways. He may plead the appropriate Statute of Limitations and succeed on that issue, as was done by the British Overseas Airways Corporation in *Wimpey's* case (2). He may escape because the wrongful act with which he is charged is not the act which caused the damage, or because the plaintiff failed to prove the wrongful act which caused the damage or for some other reason of a technical nature.

The question then arises: can a tortfeasor who has been found liable recover contribution from another tortfeasor who was sued and escaped liability to the plaintiff for one of the reasons I have mentioned? Do the words "if sued" offer an alternative to the tortfeasor seeking contribution in such a case? Can it be argued in this case that if the appellant escapes liability to the plaintiff because he was not properly sued on the pleadings yet he would have been held liable if he had been sued for overloading his lorry and is therefore bound to contribute?

Viscount Simonds L.C. in *Wimpey's* case (3) deals with this very point. "Contribution", he says, "is recoverable from one who in an actual suit by the

(1) [1955] A.C. at 191.
(2) [1955] A.C. 169.
(3) [1955] A.C. at 178.

"injured man has been held liable by judgment: it is "recoverable from one who, if sued, would in that "hypothetical suit have been held liable. Is it also "recoverable from one who has actually been sued by "the injured man and held not liable? It happens in "the case under appeal that the reason why the party "from whom contribution was claimed was held not "liable because the Limitation Act was successfully "pleaded. But this is irrelevant to the issue. The "same question would arise if the claimant tort-feasor "alleged that the defence, though it succeeded on the "merits, was successful only because the case had been "inadequately presented or even because the judge or "jury had taken a wrong view of it."

These observations apply equally to the present case. The B.O.A.C. escaped liability to Littlewood by successfully pleading the Limitation Act, 1939, and was therefore held not liable to make contribution to George Wimpey & Co., Ltd. In the present case the appellant, as we hold, escapes liability to the plaintiff because the charge of overloading was not made in the pleadings, and it therefore follows that the appellant is not liable to make contribution to the third and fourth named defendants.

It must be admitted that this interpretation of section 16 (1) (*c*) leads to some extraordinary anomalies which have been fully discussed in the English Courts.

In the present case the second dependants, George Gregg & Co., are deprived of their right to contribution, because the plaintiff did not sue the appellant for overloading the lorry. It may well be asked why should the defendants, having proved the appellant a tort feasor, be defeated in their claim for contribution through no fault of their own, and why should the plaintiff have it in his power to determine whether or not contribution should be obtained?

Such results could never have been contemplated by the draftsman and it is not unlikely that similar anomalies will recur in other cases unless the section is redrafted so as to carry out what appears to have been the intention of the Legislature. The appeal must be allowed.

BLACK L.J.: As appears from the indorsement on the writ of summons this action, so far as it concerned the defendant Wallace, was a claim for damages against him based on the allegation that the death of the plaintiff's husband was occasioned by the negligence of Wallace, his servants and agents, (*a*) in the driving, control and management of a motor lorry, and (*b*) in failing to provide safe means of transport and a safe system of work.

When, however, it came to the statement of claim the only facts alleged, so far as the plaintiff's claim against Wallace was concerned, were facts which would enable her to sustain a case against him on the ground of the negligence of his lorry driver in the driving, management and control of the lorry. No facts were alleged in the statement of claim which could support the allegation in the indorsement of the writ of negligence on the part of Wallace in failing to provide safe means of transport or a safe system of work. It is clear from the judgment of the trial judge that this omission from the statement of claim of any allegation of failure on the part of Wallace to provide safe means of transport or a safe system of work was not due to any oversight but was considered and deliberate. In his defence Wallace dealt only, of course, with the allegations made against him in the statement of claim and so far as Wallace was concerned the case came to trial against him on the issues raised in these pleadings. At the trial no allegation was made on behalf of the plaintiff that Wallace had failed to provide safe means of transport or a safe system of work; but the allegation that Wallace's lorry in which the deceased was travelling had been overloaded was so strongly pursued on behalf of the defendants Graham and Messrs. George Gregg & Sons, Ltd. (which company I shall, for the sake of brevity, refer to simply as "Gregg") that the learned judge decided to leave a question to the jury on the point. It appears from the notes that counsel on behalf of Wallace in addition to submitting that there was no evidence of negligence in loading proper to be left to the jury, further submitted that the question of unsafe loading was not an issue between

the plaintiff and Wallace but that it could be used by the owner and driver of the other lorry to increase the share of blame of Wallace and his driver and that therefore it could be left to the jury. This submission so far as it affected the plaintiff appears to have been accepted by the plaintiff's counsel for no application was made by them at that stage for liberty to amend their statement of claim, an application which ought certainly to have been made if they desired to be in a position to ask for judgment against Wallace in the event of the jury finding him guilty of negligence in causing or permitting the lorry to be overloaded. Notwithstanding the case made during the trial on behalf of the defendants Graham and Gregg, plaintiff's counsel apparently still adhered to the view which they took when settling the statement of claim.

In the result in answer to the questions submitted to them by the learned judge, the jury found Wallace's driver, Curry, not guilty of negligence in the driving or management of his lorry. They answered in the affirmative the question whether Wallace was guilty of negligence in causing or permitting the overloading of the lorry. They found the defendant Graham (Gregg's driver) guilty of negligence in the driving or management of his lorry and they held that the damages should be paid as to one third by Wallace and as to two-thirds by Graham and Gregg.

On these findings counsel for Wallace asked for judgment and the matter was adjourned for further consideration. At the adjourned hearing counsel for the plaintiff applied for liberty to amend his statement of claim by adding an allegation of negligence against Wallace in failing to provide and maintain safe transport. The learned judge on consideration held that the plaintiff was on the findings of the jury entitled to judgment both against Wallace and against Graham and Gregg and that there was no necessity for an amendment of the statement of claim. He expressed the opinion, however, that he did not think that he should have given leave after verdict to make the amendment sought.

I have no hesitation in subscribing to the view that after verdict it was far too late to grant an amendment of the statement of claim in order to introduce an allegation which had been deliberately abandoned by the plaintiff at an early stage of the action and which had never been relied upon by her at the trial. But if such an amendment is not made I fail to see how the plaintiff could be entitled to judgment upon the case as pleaded against Wallace. The only claim against him in the statement of claim was on foot of his vicarious responsibility for the alleged negligent driving of his driver Curry. On the pleadings as they stood this was the only cause of complaint against Wallace and the only issue to be determined at the trial as between the plaintiff and him. Under our system of pleading in the High Court cases have to be decided *secundum allegata* as well as *secundum probata*. In my opinion the plaintiff was not entitled without an amendment of the pleadings to judgment against Wallace on a totally different issue from the one issue raised in the statement of claim and on an issue, indeed, which deliberately and significantly her advisers had never sought to raise or rely upon at the trial. In my opinion, therefore, the judgment entered for the plaintiff against Wallace should be set aside and in lieu thereof Wallace should have judgment against the plaintiff.

This brings me to the real difficulty in the case, the position as between Wallace on the one hand and Graham and Gregg on the other hand. This depends on the effect of section 16 (1) (*c*) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, which corresponds word for word with section 6 (1) (*c*) of the English Law Reform (Married Women and Tortfeasors) Act, 1935, so much discussed in the recent case of *George Wimpey & Co., Ltd. v. British Overseas Airways Corporation* (1). I have read and re-read time and again the reports of that case, the judgment of Parker J., the arguments and judgments in the Court of Appeal, and now the speeches in the House of Lords. The difficulties of arriving at a

(1) [1955] A.C. 169.

satisfactory interpretation of the sub-section are vividly illustrated by the remarkable conflict of judicial opinion among the learned judges who have been concerned to consider it. I cannot pretend to be able to add anything of my own to the considerations which have been so thoroughly discussed and explored. Unfortunately, as the Lord Chief Justice has pointed out, the decision in the House of Lords does not give us authoritative guidance. The words we have to consider are "any tort-feasor liable in respect of that "damage may recover contribution from any other "tort-feasor who is, or would, if sued, have been, liable "in respect of the same damage." It is obviously difficult to arrive at a view entirely satisfactory to one's mind in regard to the application of the sub-section to a case such as the present which the draftsman may never have envisaged. The section, however, appears to me to contemplate that a tortfeasor may recover contribution (*a*) from another tortfeasor who has either admitted liability or is adjudged liable in an actual action and (*b*) from another tortfeasor who would have been held liable if he had been sued in a hypothetical action. In the present case the plaintiff sued Wallace in an actual action founded according to the indorsement on the writ not only on the ground of the negligence of his lorry driver in the driving, control and management of the lorry but also on the ground of Wallace's own negligence in failing to provide safe means of transport and a safe system of work. Once judgment has as the result of the trial of the action, been entered in Wallace's favour, as I am of opinion it ought to be entered, than in my view both of the allegations of negligence in the indorsement of the writ must be taken to have been ruled in Wallace's favour, and, as between the plaintiff and Wallace, Wallace has been conclusively adjudged not liable on both of the grounds on which the action was founded. If this is so I do not see how, when a man has been held not liable when sued by the plaintiff in an actual action for failing to provide safe means of transport, it could be said that he would have been held liable if sued by the plaintiff in a hypothetical action for that

failure. We are not troubled here with the time factor which gave rise to so much difficulty and perplexity in *Wimpey's* case (1). It results that in my opinion the defendants Graham and Gregg do not succeed in bringing themselves within the wording of the sub-section and are not entitled to recover contribution from Wallace.

I am fully aware that if my view of the effect of the wording of the sub-section is sound it leads to some anomalous and indeed extraordinary consequences. If the plaintiff had not chanced to join Wallace as a defendant Graham and Gregg would undoubtedly on the jury's findings have been entitled to recover contribution against him. And it may possibly be (though I deliberately express no opinion on the point) that the same result might in law have followed if the plaintiff had not included Wallace's alleged failure to provide safe means of transport in the indorsement of the writ. However, the conclusion at which I have arrived appears to me to be the one which follows from the wording of the sub-section. That the English courts had the existence of such anomalies clearly before them is abundantly shown by the reports of the arguments and the judgments in *Wimpey's* case (1).

Appeal allowed.

Solicitor for the appellant: *J. Morris McKee.*

Solicitors for the respondents: *Montgomery, McDermott & Munn.*

Solicitor for the plaintiff: *P. Maxwell.*

(1) [1955] A.C. 169.

S.M.M.

REGINA v. WALLACE (1).

Criminal law—Sentence—Motoring offences—Disqualification for life for holding driving licence—Definite period—Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926 (16 & 17 Geo. 5, c. 31), s. 4 (1).

A penalty of disqualification for life for holding a licence to drive a motor vehicle is a penalty for a certain and definite period and a court has jurisdiction to impose such a penalty for offences under the Road Traffic Acts.

R. v. Fowler (1937) 26 Cr. App. R. 80 considered.

APPEAL against sentence.

The appellant pleaded guilty at the Northern Ireland Winter Assizes, 1954, to two charges of driving a motor vehicle while under the influence of drink and to a charge of reckless driving. He was sentenced by Lord MacDermott L.C.J. to two years' imprisonment and he was disqualified for life for holding a driving licence. He now appealed against sentence on the grounds (inter alia) that the sentence was illegal and without jurisdiction. The case is reported only on the question of the validity of the penalty of disqualification for life for holding a driving licence.

McVeigh Q.C. for the appellant. A sentence of disqualification for life is illegal. It is based on section 4 (1) of the Motor Vehicles (Traffic and Regulations Act, 1926. It has been decided that a court cannot disqualify for an indefinite period : *R. v. Fowler* (2). There is no case dealing expressly with the point that disqualification for life is illegal. I submit that a sentence of disqualification must be for a time that is certain. If an indefinite period is bad, as laid down in *Fowler's* case (1), disqualification for life is bad. The section contemplates a time that is certain.

McCall Q.C. for the Crown was not called on.

The judgment of the court was delivered by BLACK L.J., who after considering the facts of the case and the other grounds of the appeal, continued as follows :

(1) In the Court of Criminal Appeal before Black L.J., Sheil and Curran JJ. : February, 3, 1955.

(2) (1937) 26 Cr. App. R. 80 ; 53 T.L.R. 649.

I come now to the point about disqualification for life. Section 4 (1) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, provides :

" Without prejudice to the infliction of any other " penalty, any court before whom a person is con- " victed of any offence under this Act, or of any " offence in connection with the driving of a motor " car punishable (whether on indictment or sum- " marily) otherwise than under this Act—

" (*a*) may, if the person convicted holds a " licence under this Part of this Act, suspend that " licence for such time as the court thinks fit, " and also declare the person convicted to be " disqualified for obtaining such licence for such " further time after the expiration of the licence " as the court thinks fit ; . . . . . "

It is submitted by Mr. McVeigh that the Lord Chief Justice was not entitled to disqualify the appellant for driving for life. He relies on the case of *R. v. Fowler* (1), where the Court of Criminal Appeal in England held that a disqualification for holding a driving licence must not be for an indefinite period. We recognise that a penalty imposed upon a person convicted of an offence must be certain. But we are of opinion that disqualification for the life of a person convicted is disqualification for a certain and definite period and is authorised by the section. This court would be slow to hold that the legislature intended that a disqualification for 60, 70 or 80 years could be imposed, as Mr. McVeigh concedes, but not disqualification for life. Accordingly, the appeal cannot be sustained on this ground. On the facts of the case and in view of the appellant's previous bad record of motoring offences we are satisfied that the Lord Chief Justice's decision disqualifying him for life was fully justified.

Appeal dismissed.

Solicitors for the appellants: *Bernard Campbell & Co.*

Solicitors for Crown : *Crown Solicitor for the County of Antrim.*

[Reported by Mr. J. A. L. M'Lean, Barrister-at-Law].

(1) (1937) 26 Cr. App. R. 80 ; 53 T.L.R. 649.

MINISTER OF AGRICULTURE v. McGEOUGH (1).
MINISTER OF AGRICULTURE v. FITZPATRICK (2).

Emergency legislation—Importation of livestock—Seizure—Forfeiture proceedings—Service of summons—Whether ordinary petty sessions procedure applicable—Petty Sessions (Ireland) Act, 1851 (14 & 15 *Vict. c.* 93) *ss.* 12 (3), 20 (1)—*Agriculture (Miscellaneous War Provisions) Act*, 1940 (3 & 4 *Geo.* 6, *c.* 14), *s.* 28—*Livestock (Import from Eire and the Isle of Man) Regulations*, 1945 (*S.R. & O.* 1945 *No.* 942).

Summary jurisdiction—Procedure—Service of summons—Service at defendant's premises—Appearance at hearing for purpose of disputing service—Petty Sessions (Ireland) Act, 1851 (14 & 15 *Vict., c.* 93) *ss.* 12 (3), 20 (1).

The ordinary procedure of courts of summary jurisdiction in relation to the service of a summons applies to proceedings taken pursuant to regulation 5 of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945.

Section 12 (3) of the Petty Sessions (Ireland) Act, 1851, which provides for service on a defendant by leaving a copy of the summons "at his last or most usual place of abode, or at his office, warehouse, counting-house, shop, factory, or place of business" with "some inmate" requires that it be left in circumstances where it would be natural to expect that it would come to the notice of the defendant. Accordingly it was *held* that where a copy of the summons was handed to the defendant's wife as she stood on the public highway an arm's length from a gate leading to a farmhouse occupied by the defendant there was no service to satisfy the Act.

If a defendant who has not been served with a summons is personally present in court at the time mentioned in such summons the magistrate has jurisdiction to hear the complaint. If a defendant who has not been served with a summons is not personally present but appears by an agent instructed to dispute service the magistrate has no jurisdiction to hear the complaint: *aliter* if the agent were authorised to represent the defendant on the merits.

CASES STATED by the Resident Magistrate sitting at Newry Petty Sessions.

These two cases raised questions relating to the

(1) In the Queen's Bench Division (Crown Side) before Lord MacDermott L.C.J. and Sheil J.: Jan. 14, 18, 1955.

(2) In the Queen's Bench Division (Crown Side) before Lord MacDermott L.C.J. and Sheil J.: Dec. 21, 1954; Jan. 18, 1955.

validity of the service of a summons in proceedings taken pursuant to regulation 5 of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945. The cases were heard separately but judgment in each was given on the same day.

MINISTER OF AGRICULTURE v. MCGEOUGH.

In this case the Minister of Agriculture applied to petty sessions by way of summons pursuant to regulation 5 (4) of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, for an order for the forfeiture of the proceeds of sale of pigs alleged to have been imported in contravention of the Regulations. When the summons came on for hearing the defendant was represented by a solicitor who stated that he was instructed to appear only for the purpose of objecting to the service of the summons.

The following were the relevant facts found by the resident magistrate :

(i) that the defendant was the occupier of—
  (*a*) a farm and farmhouse at Edenappa, Forkhill, Co. Armagh ;
  (*b*) a farmhouse in Northern Ireland a quarter of a mile from (*a*) ;
  (*c*) a piggery situated in the Republic of Ireland a short distance from (*a*).
(ii) that at all material times the defendant was residing at (*b*).
(iii) that the process server attempted to serve the summons at (*b*) but the defendant was absent.
(iv) that later the same day he purported to serve the summons by handing it to the wife of the defendant on the public road in Northern Ireland within an arm's length of a gate leading to the farmhouse at (*a*).

It was contended by the defendant's solicitor that a summons was necessary to institute proceedings under regulation 5 (4) of the Regulations of 1945, that such summons should be served in accordance with section 12 (3) of the Petty Sessions (Ireland) Act, 1851, and that no such service had been effected in the present case in that the summons was not served at the

defendant's premises but on the public road. It was further argued that the defendant was entitled to appear by his solicitor for the purpose of disputing service only.

For the Minister it was contended that the summons was properly served under section 12 (3) of the Act of 1851 in that it had been served at the defendant's premises although not actually on the premises. It was further argued that a summons was unnecessary to found jurisdiction in proceedings brought under the Regulations, and that all that was required was that the defendant should have actual or constructive notice of the application.

The resident magistrate found as follows :

(1) that the summons was not served in accordance with section 12 of the Petty Sessions (Ireland) Act, 1851.

(2) that it was served on the public road, and not at the defendant's residence or place of business.

(3) that "at" means on the premises of the defendant and nowhere else.

(4) that a summons is necessary to institute proceedings under regulation 5 (4) of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945.

(5) that a solicitor is entitled to appear on behalf of a defendant and object on a point of service only.

He accordingly marked the summons "No jurisdiction," but on the application of the Minister he stated this case for the opinion of the High Court.

Nicholson Q.C. and *Lowry* for the Minister.

McVeigh Q.C. and *O'Donnell* for the defendant.

MINISTER OF AGRICULTURE v. FITZPATRICK.

In this case the summons was brought under the same Regulations and for the same purpose as in *McGeough's* case. At the hearing a solicitor appeared on behalf of the defendant and stated that he had

instructions to object that the summons had not been served on his client, but that he had no further instructions in the matter. The defendant was present in court and came forward at the request of his solicitor for the purpose of identification by the process server. The magistrate, having heard the evidence of the process server, found as a fact that the summons was not served on the defendant but that it was served at a neighbouring house on a person described as Mr. Fitzpatrick who was not the defendant. The magistrate accordingly held that he had no jurisdiction to hear the summons, but on the application of the Minister he stated this case for the opinion of the High Court.

Nicholson Q.C. and *Lowry* for the Minister.

McVeigh Q.C. and *O'Donnell* for the defendant.

McGeough's Case.

Lord MacDermott L.C.J. stated the issues raised by the case and continued :

The first question, therefore, is whether the provisions of the 1851 Act apply to proceedings brought under the 1945 Regulations. I do not propose, on this occasion, to consider whether each and every one of the provisions of that Act are applicable to such proceedings but will deal with the matter broadly and with special reference only to such of those provisions as are now in point.

It is clear that the 1851 Act can apply to proceedings brought under enactments passed after that date, and that it was intended to be of general application. Many of the sections, including section 20, commence with the words " In all cases of summary jurisdiction. " It is also clear that the Regulations, while providing for applications to a court of summary jurisdiction, do not deal in detail with the procedure to be adopted. It seems to me to be a natural conclusion that it was intended that the ordinary procedure of courts of summary jurisdiction was to be followed. It may be that there are some respects in which the ordinary procedure at petty sessions would have to be modified

in relation to these Regulations, but in this particular instance, the Regulations being silent as to the method of service, I think the proper inference is that the provisions of section 12 of the 1851 Act are applicable. Indeed, on the further hearing of this case, I did not understand counsel for the Minister to argue to the contrary.

The second question is whether in the instant circumstances the provisions of section 12 of the 1851 Act have been complied with. It is common ground that, in this connection, the case falls to be considered with regard to subsection (3) of that section, rather than subsections (1) or (2). Subsection (3) provides that if the defendant is not served personally, service is to be effected by " leaving " a copy of the summons for him " at " his last or most usual place of abode or at his office, warehouse, countinghouse, shop, factory, or place of business, with " an inmate of the house " not under sixteen years of age.

The relevant findings of fact in this case are set out in the case stated, and are as follows :—

The defendant is the occupier of three sets of premises—

(*a*) a farm of land farmhouse out offices and buildings situate at Edenappa, Forkhill, Co. Armagh.

(*b*) a farmhouse situated about a quarter of a mile from (*a*) and in Northern Ireland.

(*c*) a piggery situated in the Republic of Ireland and a short distance from (*a*).

At all material times the defendant was resident at (*b*) ; the farmhouse at (*a*) was undergoing repairs and was not in use. The process server knew the defendant was resident at (*b*) and attempted to serve the summons there but the defendant was absent, and he later purported to serve the summons by giving it to the wife of the defendant on the public road an arm's length from a gate leading into the farmhouse at (*a*).

On those findings the question was raised whether such service was good service for the purposes of section 12 (3) and the resident magistrate took the

view that it was not. He arrived at that conclusion, or was assisted in reaching it, by reading the word "at" in subsection (3) as meaning "on", and he held that service effected on the public road could not be said to have been effected *at* the defendant's premises.

On the facts as stated it would seem to be arguable whether the defendant's wife could be regarded as an "inmate" of the premises at (*a*), or whether those premises would fall within any of the categories referred to in section 12 (3). However, though it may be going far in the appellant's favour, I will assume that those two conditions were satisfied and come to the question of whether or not the copy summons was left for the defendant "at" the premises.

I do not intend to define the meaning of the word "at" because I do not consider it necessary for me to do so. It is a word which may, perhaps, be satisfied in different contexts by different degrees of nearness, but it seems to me that it would be impossible, on the facts of this case, to say that the summons had been left at the premises. The defendant's wife was clear of the premises, and, for all that is known, may have been leaving them altogether. In my opinion, giving the words their ordinary signification, what the section contemplates is that, whether the summons be given to some person either on the premises or in their immediate vicinity it will be left where it would be natural to expect it to come to the notice of the defendant. In this case, however, it was not left at such a place but on the public road where it would be taking a chance to assume that the summons would ever reach the defendant. I hold, therefore, that there was no service such as would satisfy the provisions of the section.

That brings me to the last point, which is whether the resident magistrate had jurisdiction by virtue of section 20 of the Act, and I deal with it on the basis that, in proceedings under the Regulations, the service of a summons is not a condition precedent to jurisdiction as it is in some cases, such as those brought under the Food and Drugs Acts.

I may say in the first place that if section 12 is applicable to proceedings of this sort, so also is section 20, for it purports to apply to all cases of summary jurisdiction. Section 20 (2) requires proof of service of the summons, but subsection (1) provides that if the defendant or his agent shall appear, it shall be unnecessary to prove service at all, and it has long been recognised that if the defendant is present before the court service of the summons becomes immaterial.

In the present case, however, the defendant did not appear personally, but by his solicitor who was instructed for the limited purpose of objecting to the service of the summons. Nevertheless it was argued that even in those circumstances the presence of the defendant by his agent would enable the court to follow the procedure set out in section 20 (1). The words " agent " and " agency ", however, necessarily connote authority and the extent of that authority therefore becomes material.

The solicitor in this case appeared, and was only instructed to appear, for the purpose of making the submission that the summons had not been properly served. Is that sufficient to attract jurisdiction under section 20 (1) ? In my opinion it is not, for it seems to me that the section must refer only to the appearance of an agent who is authorised to represent the defendant at a hearing on the merits.

The procedure is that the justices are empowered to proceed after they have enquired whether the truth of the complaint is admitted or denied, and that would appear to indicate that if a defendant appears by his agent, the agent must be one who has at least authority to admit or deny the truth of the complaint. In this case, therefore, I hold that the provisions of section 20 (1) are not applicable and that the resident magistrate was correct in his decision on that point.

That brings me to the questions which are submitted in the case stated. The resident magistrate asks whether the following findings are correct in law :

(1) that the summons was not served in accordance with section 12 of the Petty Sessions (Ireland) Act, 1851.

In my opinion the court should answer that the resident magistrate was correct in this finding.

(2) that it was served on the public road, and not at the defendant's residence or place of business.

In my opinion the court should answer that this finding is correct also.

(3) that "at" means on the premises of the defendant and nowhere else.

For the reasons already stated I consider that it is unnecessary for the court to deal with this finding, and indeed I consider it wise to refrain from doing so, for the word "at" is capable of having different degrees of meaning in different circumstances.

(4) that a summons is necessary to institute proceedings under regulation 5 (4) of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945.

I regard this finding as relating to matters other than those concerning service, and, on that basis, I say it is correct in law.

(5) that a solicitor is entitled to appear on behalf of a defendant and object on a point of service only.

I would answer that this finding is correct in law. While this ruling may produce anomalies, the facts of the other case before the court (1) indicated that it is in the public interest that the circumstances of service can be brought to the attention of the court. In that case it appeared that service had been effected on the wrong person, and although that is a different case from the present one, it does show the desirability of allowing a defendant to instruct a solicitor to appear on a point of service.

SHEIL J.: I agree with the judgment which has just been delivered by the Lord Chief Justice and I also agree that it is not necessary for us to decide in this

(1) *Fitzpatrick's* case, infra p. 147.

case that the word " at " as used in section 12 (3) of the Petty Sessions (Ireland) Act, 1851, means that the summons must be served on or within the premises.

The object of the subsection is to ensure that the person to whom a summons is directed shall be made aware of it. That is why in the first instance the summons must be served upon that person. It is only failing personal service, or in the words of the subsection " if the defendant cannot be conveniently met " with, " that the provisions regarding what I may term substituted service come into operation. With regard to that form of service, there are three things necessary. First, a copy of the summons must be left for the defendant ; secondly, the copy must be left at the defendant's last or most usual place of abode, or at his office, warehouse, countinghouse, shop, factory, or place of business, and, thirdly, it must be left with an inmate of the house, which means an inmate of the house at which the summons is left. It seems to me, therefore, that in this case there was not a proper service of the summons. As I have said, I have reached the conclusion that it is not necessary to decide whether the word " at " is equivalent to " on, " or whether the requirements of the section might be met if the summons was served somewhere very near the premises. That may be left to be dealt with on another occasion, if necessary.

Appeal dismissed.

FITZPATRICK'S CASE.

LORD MACDERMOTT L.C.J. : In this case the summons was brought under the same Regulations and for the same purpose as in *McGeough's* case (1). Thomas Fitzpatrick was the claimant in respect of certain livestock which had been seized, and the summons was issued according to the provisions of regulation 5 (4) of the Regulations by the Minister of Agriculture. The case stated shows that, on the hearing of the summons, Mr. Curran appeared for the defendant for the purpose of objecting to the jurisdiction on the ground that the

(1) Supra p. 142.

summons was not properly served on his client. The process server was called and examined as to the service of the summons and the learned resident magistrate reached the following findings of fact :

(i) that the summons was not served on the said Thomas Fitzpatrick ;

(ii) that it was served at a neighbouring house on a person who was described as Mr. Fitzpatrick by the summons server and who was not the said Thomas Fitzpatrick ;

(iii) that the said Thomas Fitzpatrick was present in court.

On those facts the resident magistrate held that the summons was not served in accordance with section 12 of the Petty Sessions (Ireland) Act, 1851, and accordingly that he had no jurisdiction to hear the application, and the question for the court is whether he was correct in law.

In this case the first question to be considered is one which has been considered in *McGeough's* case (1), namely, does the 1851 Act, and in particular section 12 thereof, apply to proceedings brought under the provisions of the Regulations of 1945, and for the reasons stated in that case I hold that section 12 of the Act does so apply. On the facts of this case it appears that there was no service at all for the purposes of the section.

A second point, must therefore, be considered, and that is whether by reason of the presence of the defendant the resident magistrate had jurisdiction under the provisions of section 20 of the Act of 1851. It seems to me that on the plain meaning of the words of that section the magistrate had jurisdiction, and that as the defendant was present no insuperable difficulty was caused by reason of the insufficiency of service. In this case, no question of agency arises, as it did in the *McGeough's* case (1), because the defendant himself was present, and accordingly it seems to me that there was nothing to prevent the resident magistrate from proceeding as provided by section 20 (1).

(1) Supra p. 142.

In my opinion, therefore, the answer of the court to the question asked in the case stated should be " No, " section 20 of the Act of 1851 being applicable. " I would, therefore allow the appeal and remit the case to be dealt with according to law.

SHEIL J. : I concur.

Appeal allowed.
Case remitted.

Solicitor for the Minister : *Chief Crown Solicitor.*
Solicitor for the defendant in each case : *P. G. Curran.*

J.P.

PATTERSON v. DUGAN (1).

Housing—Sale of subsidy house—"Permitted Price"—Building Materials and Housing Act, 1945 (9 & 10 *Geo.* 6, *c.* 20), *s.* 7—*Housing* (*No.* 2) *Act* (*Northern Ireland*), 1946 (10 & 11 *Geo.* 6, *c.* 20), *s.* 7—*Housing Act* (*Northern Ireland*) 1951 (15 & 16 *Geo.* 6, *c.* 13) *ss.* 2, 5.

Section 7 (1) of the Housing (No. 2) Act (Northern Ireland), 1946, included in the covenants to be entered into by a building owner obtaining a subsidy under that Act certain statutory conditions, including the condition that for a specified period the house should not be sold or transferred for a consideration which exceeded in value the amount by which the "permitted price" exceeded the amount of the subsidy. By section 7 (2) the value of any consideration in excess of the consideration allowed by the statutory condition referred to could be recovered by the purchaser. The "permitted price" was defined by reference to the Building Materials and Housing Act, 1945, in which Act "permitted price" meant the figure stated in the building licence and limiting the price for which the house might be sold.

A building licence issued in respect of a subsidy house stated that the "permitted price" for the purposes of the Building Materials and Housing Act, 1945, was £1770, including £300 in respect of the capitalised value of a ground rent of £15 per annum with which the site was burdened. The completed house was sold for £1520—being £1770 less the building subsidy of £250—to a purchaser who covenanted to pay the ground rent of £15 per annum and to keep the vendor indemnified in respect of it. The purchaser subsequently sought to recover from the vendor the sum of £300 representing the capitalised value of the ground rent.

Held, by the Court of Appeal (Lord MacDermott L.C.J., Porter and Black L.JJ), (i) that the relevant legislation contemplated only one "permitted price" which was that fixed by the building licence, and this figure could not vary according to the mode by which the sale was effected or according to the extent of the interest transferred; (ii) that the value of the covenant by the purchaser to pay the ground rent of £15 per annum and to keep the vendor indemnified in respect of it could not be added to the purchase price actually paid in order to calculate the consideration for the purposes of section 7 (2).

Held further by Porter L.J. (Lord MacDermott L.C.J. and Black L.J. reserving their opinion on the point) that any rights which the plaintiff might have acquired were abrogated by the operation of sections 2 and 5 of the Housing Act (Northern Ireland), 1951.

Appeal to the Court of Appeal from the decision of Sheil J. on the trial of an action.

(1) In the Court of Appeal before Lord MacDermott L.C.J. and Porter and Black L.JJ.: Jan. 11, 14, May 17, 1954.

On March 6, 1947, the appellant obtained a lease of a building site situate in the townland of Church Quarter, Dundonald, County Down, for the term of 10,000 years subject to a yearly rent of £15 and to certain covenants, including a covenant to expend at least £1,000 in the erection of a dwelling house on the site. In performance of this covenant the appellant caused a subsidy house to be built, for which purpose he had to obtain a building licence under regulation 56A of the Defence (General) Regulations. One of the conditions contained in the licence was as follows :—

"The permitted price—See Section 7 of the Building "Materials and Housing Act, 1945 (1)—shall be £1,770 "(one thousand seven hundred and seventy pounds) "including £300 (three hundred pounds) in respect of "a capitalized value of a ground rent of £15 (fifteen "pounds) per annum."

The definition of the "permitted price" contained in the Building Materials and Housing Act, 1945, is incorporated in the Northern Ireland legislation regulating the grant of housing subsidies (2).

In due course the appellant applied to the Castlereagh Rural District Council, the local authority concerned, for the payment of a subsidy of £250 in respect of the house he had built. This application was made and granted under Part III of the Housing

(1) By the Building Materials and Housing Act, 1945, s. 7 (1) :
Section 7—

"(1) Where a house has been constructed under the authority of a "licence granted for the purposes of a Defence Regulation (hereinafter "referred to as 'a building licence') and the licence, whether granted "before or after the passing of this Act, has been granted subject to any "condition limiting the price for which the house may be sold or the rent "at which it may be let, any person who, during the period of four years "beginning with the passing of this Act, sells or offers to sell the house for "a greater price than the price so limited (hereinafter referred to as 'the "'permitted price') or, as the case may be, lets or offers to let the house "at a rent in excess of the rent so limited (hereinafter referred to as 'the "'permitted rent'), shall be liable on summary conviction to a fine . . . . . "or to imprisonment . . . . . "

(2) By the Housing (No. 2) Act (Northern Ireland), 1946, s. 6 (6) :
Section 6—

"(6) For the purposes of this Part of this Act the expressions 'building "'licence' and 'permitted price' shall have the same meanings as in "section seven of the Building Materials and Housing Act, 1945."

(No. 2) Act (Northern Ireland), 1946, and subject to the conditions therein contained. Before the local authority could pay the appellant the subsidy grant he was obliged to execute an instrument containing certain covenants as provided by section 7 of the 1946 Act (1), and empowering the local authority to charge the house with repayment of the amount of the subsidy in certain events. By it the appellant covenanted, inter alia, that for five years after the date of the instrument: "The lands described in the schedule "hereto shall not be sold or transferred for a con- "sideration which exceeds in value the sum of One "thousand five hundred and twenty pounds."

The schedule described the lands as in the lease, adding that they are held under it for the residue of the term of 10,000 years at the yearly rent of £15.

In December, 1949, the appellant agreed to sell the house to the respondent for £1,520 and this sale was

(1) By the Housing (No. 2) Act (Northern Ireland), 1946, s. 7: Section 7—

"(1) Before a grant is paid by a local authority under sub-section (1) "of the last preceding section in respect of any house the owner shall "execute and hand over to the local authority an instrument in such form "as may be prescribed whereby—

"(*a*) the owner for himself and his successors in title covenants "with the local authority that the house shall until the expiration of the "period of five years next after the date of payment of the grant (in "this part of this Act referred to as the 'relevant period') be held "subject to the following conditions (in this part of this Act referred "to as the 'statutory conditions') that is to say:—

(i) "the house shall not be sold or transferred for a con- "sideration which exceeds in value the amount by which the "permitted price exceeds the amount of the grant payable in "respect of the house; . . . . . .

"(2) On any sale or transfer of the house the value of any consideration "in excess of the consideration allowed under the statutory condition "imposed by virtue of subparagraph (1) of paragraph (*a*) of the last pre- "ceding subsection may, without prejudice to the operation of any of the "provisions of section seven of the Building Materials and Housing Act, "1945, or to any other remedy, be recovered by the purchaser or transferee "or any successor in title of either as a civil debt due to him from the "vendor or transferor and where any part of the consideration for any sale or "transfer consists of any rent reserved in favour of the vendor or trans eror "or any person nominated by him, the value of such part shall for the "purposes of the said condition be taken as twenty times the amount of "such rent as would accrue due over the period of one year."

carried out by an indenture of assignment dated January 16, 1950, whereby the appellant assigned the residue of the term of 10,000 years to the respondent subject to the said rent of £15, and the respondent covenanted to pay that rent and to indemnify the appellant in respect of all claims in respect of its non-payment.

On November 17, 1952, the respondent issued a writ claiming £300 as the amount by which the £1,520 paid by him for the house was alleged to exceed the allowed consideration.

Sheil J., sitting without a jury, allowed the claim in full and the appellant appealed to the Court of Appeal.

Reid for the appellant.
Stewart Q.C. and *Bready* for the respondent.

Cur. adv. vult.

LORD MACDERMOTT L.C.J. stated the facts and continued: The defendant's first point is that upon his execution of the instrument of September 28, 1948, the maximum consideration on sale was fixed, not by the terms of the building licence, but by the covenant which limited the value of such consideration to £1,520. An argument in support of this submission was founded on the language of subsections (1) and (2) of the original section 7 of the Act of 1946 and, in particular, on the provisions of subsection (1) respecting the registration of any instrument made thereunder which, it was said, were obviously aimed at giving intending purchasers notice of, inter alia, the price limiting covenant. Despite the ingenuity of this contention I am of opinion, however, that it cannot prevail. What section 7 (2) referred to was " . . . any consideration " in excess of the consideration allowed under the " statutory condition imposed by virtue of sub-" paragraph (i) of paragraph (*a*) of the last preceding " subsection . . .", and that provision, which is described in that paragraph as a statutory condition, makes the value of the maximum consideration " the

" permitted price " minus the amount of the subsidy grant. The issue, therefore, cannot be finally decided by reference to the terms of the instrument alone. One has still to find the permitted price and that takes one at once to the terms of the building licence.

Accepting this as the position, the defendant's second point is that, on the true construction of the licence, the permitted price was £1,770, and, accordingly, that the consideration allowed under section 7 (1) (*a*) (i) of the Act of 1946 at the time of sale was £1,770, less £250, the amount of the subsidy grant, or £1,520. If that is the correct reading of the licence, and if one has not to look beyond the monetary consideration paid by the plaintiff, then what was paid did not exceed the statutory maximum and there is no excess to recover.

The first question on this submission is, therefore, one of interpretation. What, according to the licence, was " the permitted price " in respect of the sale by the defendant to the plaintiff?

At the date of the licence the defendant had obtained his lease of the house site on the terms already mentioned, and it is reasonable to assume that the licensing authority knew this and that the reference to " a ground rent of £15 " sprang from its knowledge that the defendant had incurred an obligation to pay such a rent in order to obtain the site. Where a person seeking a building licence obtained the ground he was going to build on in fee simple by payment of a lump sum, it is to be expected that that sum would be reflected in the permitted price and that it would rank as part " of the cost to the person at whose expense the " house has been provided " within the meaning of section 6 (1) (*c*) of the Act of 1946 as originally enacted and as it stood when the licence in question was issued. If the building site was obtained, however, not in fee simple for a lump sum, but on a long lease subject to a yearly rent, the situation as respects price control and subsidy grants was obviously quite different, for in such case, or at all events where, as in this instance, the site had not to be subdivided, the normal course would be for the building owner to do as was done here,

namely, to sell the interest he owned, that is to say, his leasehold interest, the purchaser taking the remainder of the term by assignment subject to payment of the rent and to the covenants usually given by the assignee of a leasehold. In one case—the case where the land is purchased outright—the building owner looks to the price he obtains to recoup him for the cost of the site. In the other he contemplates passing on the cost of the site, in the shape of the rent payable to his lessor, to the purchaser.

Now the difficulty here seems to arise from the circumstance that the draftsman of condition (*d*) of the licence wanted—possibly because of the terms of section 6 (1) (*c*) of the Act of 1946, as it then stood—to include in the permitted price an element which would represent the cost of the site. And this he did by capitalising the £15 ground rent at £300. That, I think, is apparent from the terms of the condition, but one of the results is to make it an inappropriate condition if the house is sold eventually by way of assignment with the purchaser becoming liable for payment of the rent. The judgment of Sheil J. recognises this and, in effect, meets the difficulty by taking "the "permitted price" to be, in the circumstances, not £1,770 but that figure less the site acquisition element of £300, or £1,470. I think this may well reflect the spirit in which the relevant statutory provisions were conceived. But I do not think it accords with the proper interpretation of condition (*d*) of the licence. In my opinion there cannot here be more than one "permitted price". Whatever mistake or confusion may lie behind the drafting of this condition, it fixes the permitted price at £1,770 and I do not see any ground for saying that, as a matter of construction, it can be fixed at some different figure or at a variable figure. It is not expressed to be subject to or controlled by the manner in which the sale will be carried out. In terms it is unconditional. It might have worked if the sale had been by way of a sublease reserving a rent to the vendor. The fact that it does not work as may have been intended where the sale is by way of assignment does not suffice, in my view,

to alter the meaning of what paragraph (*d*) says, which must be the same now as it was when the licence was issued and before the machinery of sale had been settled. In my judgment, therefore, "the permitted "price" in this case must be taken as £1,770 and nothing less.

The next question arising on this submission is whether the consideration given by the plaintiff exceeded in value this permitted price less the subsidy. It could only do so if the obligations assumed by or imposed upon the plaintiff as assignee of the leasehold formed part of the consideration as that term is used in the Act of 1946. On this aspect our attention was directed to a number of authorities on the subject of what constitutes good consideration on an assignment of leasehold property. These suggests a divergence between the courts in England and Ireland and the existence of two schools of thought—one holding by *Price v. Jenkins* (1), and the other by *Gardiner v. Gardiner* (2). I do not think it necessary to discuss these authorities or such conflict as they may reveal on this matter. The question here turns on the meaning to be ascribed to "consideration" as the word is used in section 7, and it seems to me reasonably plain that the Legislature can never have intended to include in that expression anything which could not readily be valued in money or which might vary in value during the currency of the statutory conditions according to the personal standing or substance of the purchaser or purchasers concerned. It would, I think, be altogether contrary to the tenor of this legislation that the maximum monetary consideration should have to fluctuate on successive sales during the five year period according to the value to be placed upon the covenants of different individuals to pay the rent, to indemnify the vendor etc. The evidence in this case was never directed to valuing such obligations and I think the omission was sound. In my opinion the Act of 1946 did not intend to include such items in the allowed consideration; and if they are ignored the consideration given here must be limited (as it is in the writ) to £1,520, the "price paid by the plaintiff."

(1) (1877) 5 Ch.D. 619. (2) (1861) 12 Ir. C.L. 565.

For these reasons I have reached the conclusion that the value of the consideration given by the plaintiff did not exceed that allowed by section 7 (1) (*a*) (i) of the Act of 1946, and, accordingly, that his action fails and the appeal succeeds.

The defendant, it may be added, relied upon another point which arose in the course of the argument. By section 2 of the Housing Act (Northern Ireland), 1951, which obtained the Royal Assent on the 19th June of that year, sections 6 and 7 of the Act of 1946 were amended in the following respects:—By section 2 (1) the words "the permitted cost of erection specified in "the building licence authorising the construction of "the house" were substituted for the words "the "permitted price specified in that building licence" in section 6 (1) (*c*) of the Act of 1946. And by section 2 (2) a new section was substituted for section 7 of the Act of 1946 which differed from it in several material respects, one of which was that the new section 7 contained no provision corresponding to subsection (2) of the old section 7 whereby a purchaser was empowered to recover, as a civil debt, any consideration in excess of that allowed by that section on a sale.

The defendant contended that the plaintiff's right to sue had gone before the issue of the writ, with the repeal of subsection (2) of the original section 7 of the Act of 1946. The plaintiff relied upon the saving provisions of section 38 (2) (*c*) of the Interpretation Act, 1889. On the view at which I have already arrived it is unnecessary to determine this point. It does not strike me as an easy question, particularly when one takes into consideration the concluding part of section 5 (2) of the Act of 1951 which deals with construction, and for that reason it is better left until it calls for decision.

PORTER L.J. stated the facts and continued: The defendant says he was entitled to sell the house for £1,520 which does not exceed the amount by which the "permitted price", viz. £1,770, exceeds the amount of the subsidy, viz. £250, and he pointed out that in the deed made between him and the Castlereagh Rural

District Council he covenanted with the council that for a period of five years he would not sell the house for a consideration which exceeded in value the sum of £1,520. This sum was, I presume, adopted by the council according to the method of calculation on which the defendant relies, viz., £1,770, being the "permitted price" minus £250, the amount of the subsidy. Whatever authority the council may have had to fix £1,520 as the limit of the selling price, it should be observed that the plaintiff was no party to the deed and could not have been bound by the amount specified—unless, indeed, it truly represented the amount by which the "permitted price" exceeds the amount of the subsidy.

In fixing the limit of the selling price at £1,520, no account is made of the fact that under clause 1 (*d*) of the licence the permitted price of £1,770 included £300 in respect of a capitalized value of a ground rent of £15 per annum. The defendant contends that he is not concerned with the capitalised value of the rent or with any amount which is included in the sum of £1,770, and that he is concerned with nothing else except the permitted price, £1,770, and the amount of the subsidy, £250, to be deducted from it, with the result that the maximum selling price is £1,520.

There is no reference in the building licence to any selling price. The "permitted price" of £1,770 specified in condition 1 (*d*) represents the ceiling of the expenditure which the building owner is allowed to incur, and it includes (*a*) the cost of the work in the erection of the subsidy house and (*b*) £300 being the capitalized value of the ground rent of £15 per annum. It appears therefore that of the total of £1,770 a sum of £1,470 must represent the permitted cost of the work in the erection of the house. The plaintiff contends that this sum of £1,470 is the "permitted price", and by deducting the amount of the subsidy—£250 from this sum, he arrives at £1,220, which he says is the maximum selling price of the house within the period of five years from the date of the grant of the subsidy. He further says that if the maximum selling price is £1,520 as the defendant claims, the defendant on

selling reaps a profit which the Legislature could never have intended him to reap. The total cost of erecting the house was £1,470, and of this £1,220 came out of the defendant's pocket, the balance, viz., £250, being the amount of the subsidy granted by the council, so that by selling at £1,520 he makes a clear profit of £300, and in addition to this he has the benefit of a covenant by the plaintiff indemnifying him against the yearly rent of £15, whatever the value of such a covenant may be.

I do not attach much weight to this argument. It may well be that the defendant by selling at £1,520 and obtaining the indemnifying covenant reaps a benefit which, in value, greatly exceeds the amount of the subsidy, but I do not see any reason why he should not enjoy such a benefit if it accrues to him legitimately on the sale of the house.

As I have said, the "permitted price" in condition 1 (*d*) of the licence consists of two elements, viz., (*a*) the cost of the work and materials in the erection of the house, and (*b*) the capitalised value of the ground rent, and the vital mistake in the plaintiff's argument is that he takes (*a*) the cost of the work and materials as being the "permitted price" whereas that cost is only one of the elements which make up the total of the "permitted price." It must be admitted that the "permitted price" of £1,770 is composed of two dissimilar elements, one being the actual total *cost* of the work and materials, and the other being a notional amount—the capitalised *value* of the ground rent, but this dissimilarity is no reason why in determining the maximum selling price, one must take as the "permitted price" the actual cost of the work and materials and ignore the capitalised value of the ground rent, which is an integral part of the "permitted price".

There is another consideration which I think leads inevitably to the conclusion that the "permitted price" is as specified in the licence, £1,770, and not £1,470, as the plaintiff contends. Under section 6 (1) of the 1946 Act the local authority, before making the

grant of a subsidy, must be satisfied that certain conditions have been fulfilled, one of them being that " the cost to the person at whose expense the house has " been provided—has not exceeded the permitted " price specified in that building licence ". This obviously refers to the money to be expended in the erection of the house, but if the " permitted price " is £1,770 that and not £1,470 would be the ceiling of the expenditure of the owner in erecting the house. That this was not the intention of the Legislature is shewn by section 2 (1) of the 1951 Housing Act, which for the words " *permitted price* specified in that building " licence " substitutes the words " permitted cost of " *erection* specified in the building licence authorising " the construction of the house. " The reason for substituting the latter words was to remove the misunderstanding which naturally arose from the words of 6 (1) (*c*), that the permitted cost of building the house was the sum specified as the permitted price in the licence.

Mr. Reid further relied upon section 5 (2) of the Housing Act (Northern Ireland), 1951, as shewing that the plaintiff's claim cannot be sustained. The relevant parts of the sub-section are as follows :—" Where by " this Act . . . any enactments or words are directed " to be added to or repealed in either of the Acts of " 1946 . . . or to be substituted for any enactments " or words in either such Acts . . . the Clerk of Parliaments may prepare and certify a copy of the Act of " 1946 with the enactments or words added or repealed " or substituted in accordance with the direction . . . " and the King's Printer shall print in accordance with " the copy so certified all copies of that Act of 1946 " printed after the direction takes effect, and such Act " shall be construed as if it had, at the time at which " the direction takes effect, been enacted with those " additions, repeals or substitutions ".

Seeing that section 2 (2) of the 1951 Act substitutes a new section for section 7 of the 1946 Act, and that this new section entirely omits section 7 (2) of the 1946 Act, which the plaintiff claims gives him his right of action against the defendant, I think that the plaintiff

must shew (1) that the right which he claims is an acquired or accrued right within the meaning of section 38 (2) of the Interpretation Act, 1889, and (2) that the right still exists notwithstanding the omission of section 7 (2) of the 1946 Act from the new section 7, and the manner in which the Act of 1946 is to be construed as directed by section 5 (2) of the 1951 Act.

There can be no doubt that section 7 (2) of the 1946 Act is now repealed by the operation of section 2 (2) of the 1951 Act and that it was repealed as from the time when the substituted section was directed to be substituted. Now where an Act repeals any other enactment, the repeal does not affect any right acquired or accrued under the repealed enactment, unless the contrary intention appears: (section 38 (2) of the Interpretation Act). If the plaintiff is right in his contention that the permitted selling price was £1,220 instead of £1,520, I think his right to recover the excess from the defendant was a right which he acquired as soon as he paid the excess: *Hamilton Gell v. White* (1). But then the further question arises:—Does not a contrary intention appear in section 5 (2) of the 1951 Act? No doubt section 7 (2) of the 1946 Act was, in effect, repealed by section 2 (2) of the 1951 Act, but is there anything in section 5 (2) of the latter Act to indicate that the Legislature intended that acquired or accrued rights under the repealed section should cease to exist at the passing of the 1951 Act? I think that the concluding words of section 5 (2) do indicate such an intention—The words are "And such Act"—(that is the Act of 1946) "shall be construed as if it "had, at the time at which the direction takes effect, "been enacted with those additions repeals or sub-"stitutions."

These words must mean that on and after the passing of the 1951 Act—the time when the directed substitution of the new section 7 takes effect—the 1946 Act is to be construed as if it, with the substituted section 7, had been enacted at the passing of the 1951 Act. It is no longer possible to construe the Act of 1946 as if it contained section 7 (2) under which the

(1) [1922] 2 K.B. 422.

plaintiff claims. The concluding words I have mentioned are much stronger than a mere repeal, because where a repealed enactment has to be construed, the construction is not affected by the repealing Act, nor are acquired or accrued rights under the repealed Act affected unless a contrary intention appears.

In this case section 7 (2) is not merely repealed—for I cannot see any difference between the deliberate omission of it from the new section 7 and the repeal of it— but the Act of 1951 prescribes the way in which the 1946 Act is to be construed, viz., as if it, with the substitutions, had been enacted at the passing of the 1951 Act. I think that any rights acquired under section 7 (2) were cancelled and ceased to exist at the passing of the 1951 Act.

In my opinion the concluding words of section 5 (2) of the 1951 Act afford an additional reason for holding that the claim of the plaintiff cannot be sustained.

BLACK L.J. stated the facts and continued: The contest between the parties centres round the term "permitted price" and the question of the effect of the provision relating to "permitted price" contained in the licence.

For the meaning of "permitted price" we have to go back to the Building Materials and Housing Act, 1945. By section 7 (1) of that Act it was enacted that when a house had been constructed under the authority of a licence granted for the purposes of a Defence Regulation and the licence had been granted subject to a condition limiting the price for which the house might be sold (called in the Act "the permitted price") or the rent at which it might be let (called in the Act "the permitted rent") a person would be guilty of an offence punishable by fine or imprisonment if during four years after the passing of the Act (subsequently extended to eight years by section 43 (1) of the Housing Act, 1949) he sold or offered to sell the house for a greater price than the permitted price or let or offered to let the house at a rent in excess of the permitted rent.

By section 6 (1) of the Act of 1946 building subsidies became payable by local authorities when satisfied (inter alia) that the terms of any building licence granted in respect of the house had been duly complied with in all respects and that the cost of the house to the person at whose expense it had been provided had not exceeded the permitted price specified in that building licence. And section 6 (6) of the Act enacted that the expressions "building licence" and "permitted price" should have the same meanings as in section 7 of the Building Materials and Housing Act, 1945 to which I have already referred.

The only reference to permitted price in the building licence granted by the Ministry of Finance in the present case was in paragraph 1 (*d*) of the conditions set out in the licence. This condition read: "The permitted price—see section 7 of the Building Materials and Housing Act, 1945—shall be £1,770 (one thousand seven hundred and seventy pounds) including £300 (three hundred pounds) in respect of a capitalised value of a ground rent of £15 (fifteen pounds) per annum". The reason why the condition was expressed in this way in the licence was presumably for the guidance of the local authority if a subsidy was applied for under the Act of 1946 and it consequently became necessary for them to consider whether the cost of the house to the person at whose expense it had been provided had or had not exceeded the permitted price specified in the licence. The two elements in the cost to the building owner of providing the house were (*a*) the cost of the site and (*b*) the cost of erection of the building itself. These two elements when added together were not to exceed the permitted price, in this case £1,770. The site of the house had been acquired by the building owner under a lease which reserved a yearly rent of £15. The condition in the licence was intended to convey that, in calculating the cost of the house to the building owner for the purpose of determining whether a subsidy was payable by the local authority, the element in that cost which represented the cost to him of the site was to be taken as £300, being the capitalised value of the ground rent

of £15 per annum which constituted the consideration for acquiring the site.

The permitted price of the house according to the licence being £1,770 and the subsidy paid by the local authority being £250, the effect of the statutory condition set out in section 7 (1) (*a*) (i) of the Act of 1946 was that the house should not be sold or transferred for a consideration which exceeded in value £1,520. The consequence under section 7 (2) accordingly was that on any sale or transfer of the house the value of any consideration in excess of £1,520 might be recovered by the purchaser or transferee as a civil debt due to him from the vendor or transferor. In dealing with the matter it would seem as if the Legislature had in mind that the permitted price of a house was to be a price in respect of the fee simple interest in the house, and section 7 (2) of the Act of 1946 seems intended to deal with a case where the sale or transfer was a sale or transfer of the estate or interest in respect of which the permitted price was fixed. But the framers of section 7 (2) do not appear to have addressed themselves to, or to have made provision in respect of, a variety of cases in which the sale or transfer might be of a lesser estate or interest in the property. It might have been expected that the Legislature would have made provision for calculating the consideration for which lesser estates or interests might be sold or transferred but so far as I can find they have not done so. Thus if the house was held by the vendor in fee simple and he sold a mere life interest in it to a purchaser in consideration of the amount of the permitted price less the subsidy, could the purchaser recover any part of this consideration under section 7 (2) ? So far as I can see the wording of section 7 (2) would not entitle him to do so. Again in a case such as the present, where the vendor's interest in the property is merely a term of years, if he sells that interest for the permitted price less the subsidy, section 7 (2) does not in terms appear to enable the purchaser to recover any part of what he paid. The only case for which section 7 (2) makes provision, where a different interest is disposed of to the purchaser than the interest in respect

of which the permitted price was fixed, is the case where any part of the consideration for the sale or transfer consists of a rent reserved in favour of the vendor or transferor or any person nominated by him. In such case the value of such part of the consideration is to be taken as twenty times the amount of such rent as would accrue due over a period of one year. This provision of course does not cover the present case as no rent was reserved on the sale in favour of the vendor or any person nominated by him. I have little doubt but that if the Legislature had adverted to the possibility of transactions involving the sale of only a part of the interest in a house in respect of which a "permitted price" had been fixed in the building licence they would have made provision in section 7 (2) covering such transactions. But they do not appear to have done so and the court cannot fill up what amounts to a real gap in the legislation.

It remains to refer to two different grounds upon which the plaintiff's claim has been sought to be supported. In the first place it is said that on the true construction of condition 1 (*d*) of the licence the words that "the permitted price shall be £1,770 including "£300 in respect of a capitalised value of a ground "rent of £15 per annum," mean that the permitted price for the leasehold interest plus the ground rent, i.e., for the fee simple interest, is £1,770 and that the permitted price for the leasehold interest must therefore be taken to be £1,470. But when we turn to section 7 of the Building Materials and Housing Act, 1945 from which the phrase "permitted price" is taken it appears to be clearly contemplated that there shall be only one "permitted price" for a house, and not a series of "permitted prices" for separate interests in a house. There does not seem to be any warranty or authority for splitting up a "permitted price." In the present case, for good or for evil, the licence sets out the "permitted price" as £1,770.

In the second place it is said that on the sale by the defendant to the plaintiff the value of the consideration was not merely £1,520, but £1,520 plus the covenant by the plaintiff that he would thenceforth

during the continuance of the term of 10,000 years pay the rent of £15 reserved by the lease and keep the defendant indemnified against it. And it is said that the existence of this covenant justifies the decision appealed from on the ground that the true value of the consideration on the sale was not £1,520 but £1,820 i.e. £1,520 plus the capitalised value of the £15 rent at twenty years purchase. I cannot, however, accept this argument. Quite apart from the difficulty pointed out by the Lord Chief Justice of estimating the value to be attached to the covenants of particular purchasers—and it is to be remembered that a lessee has no lien on the premises for rent which he may be compelled to pay to the lessor after assignment: *O'Loughlin v. Dwyer* (1)—it seems to me that if the capitalised value of the rent is added to the money consideration paid upon the assignment we arrive at a consideration representing the value of the fee simple of the premises and not merely the value of the leasehold interest which was in fact the subject matter of the sale. In my opinion the value of the consideration for the purposes of section 7 (2) of the Act of 1946 must be taken in the present case to have been simply the £1,520 for which the defendant's leasehold interest in the premises was sold. Accordingly I agree that the decision appealed from should be reversed and the action dismissed. I come to this conclusion with regret as I feel that the decision of Sheil J. was in accordance with the policy which the Legislature desired to carry into effect by the provisions of section 7 (2) of the Act of 1946. But I cannot find that the Legislature have worded the provisions which they have made in such a way as to entitle the present plaintiff to sustain his claim.

Inasmuch as the case was contested throughout on the basis that it fell to be decided upon the provisions of section 7 of the Act of 1946 I have considered it on that basis, and in view of the conclusion at which I have arrived I have not found it necessary to express any opinion as to whether, since the substitution of a

(1) (1884) 13 L.R. Ir. 75.

new section 7 by section 2 (2) of the Housing Act (Northern Ireland), 1951, any right which a person had acquired under section 7 (2) of the Act of 1946 was abrogated by force of the provisions of section 5 (2) of this Act of 1951.

Appeal allowed.

Solicitors for the appellant : *Norman Wilson & Co.*
Solicitor for the respondent : *D. H. Smyth.*

S.M.M.

DRAYSON v. GALBRAITH AND ANOTHER, TRADING AS J. GALBRAITH & CO. (1).

Public health—Housing—Nuisance in dwelling house—Whether dwelling house unfit for human habitation—Unfitness of part of house—Public Health (Ireland) Act, 1878 (41 & 42 *Vict., c.* 52), *ss.* 110-112—*Planning and Housing Act (Northern Ireland)*, 1931 (21 & 22 *Geo.* 5, *c.* 12), *s.* 30.

Section 110 of the Public Health (Ireland) Act, 1878, requires sanitary authorities in certain circumstances to serve on the owners of premises on which a nuisance exists a notice requiring the abatement of the nuisance, and sections 111 and 112 provide for the enforcement of such notices by means of proceedings at petty sessions.

Section 30 (1) of the Planning and Housing Act (Northern Ireland), 1931, provides that "where a local authority . . . are "satisfied that any dwelling-house is in any respect unfit for human "habitation, they shall, unless they are satisfied that it is not capable "at a reasonable expense of being rendered so fit, serve upon the "person having control of the house a notice" requiring the execution of works which the local authority think necessary to render the house fit for habitation, and subsection (3) of that section provides that "notwithstanding anything contained in [section 110 of "the Act of 1878] . . . the local authority shall not serve a notice "under that section in any case to which this section applies."

The executive sanitary officer of the L. Corporation, acting on behalf of the Corporation, served the owner of premises with a notice under section 110 of the Act of 1878, and as the notice was not complied with he caused a summons to be served. The owner did not dispute the facts alleged by the sanitary officer but claimed that the house was unfit for human habitation and that the Corporation was precluded from proceeding under the Act of 1878 by reason of the provisions of section 30 (3) of the Act of 1931.

Held, by the Court of Appeal, (i) that where a local authority brings proceedings for the abatement of a nuisance in a dwelling-house under the provisions of the Act of 1878, without considering or without forming any conclusion as to the applicability of section 30 of the Act of 1931, it is a matter for the court before which the proceedings are brought to determine whether in the circumstances that section applies, i.e., whether the dwelling-house is "in any "respect unfit for human habitation," and if so, whether it is "capable of a reasonable expense of being rendered so fit."

Quaere whether the court can review a determination by a local authority as to the applicability of section 30.

(ii) that in determining whether a house is unfit for human habitation, regard is to be had to whether the house as a whole is so

(1) In the Court of Appeal before Lord MacDermott L.C.J. and Black L.J.: Nov. 18, 1954; Jan. 25, 1955.

unfit, rather than to whether it is so unfit as respects any part; and it is a question of fact and degree in each case whether the unfitness of a part of a house is such as to render the whole house unfit.

(iii) that as in the present case the findings in the case stated established only that one room in the house was unfit for habitation, the case should be remitted for a determination, (*a*) as to the fitness of the house as a whole, and (*b*) if necessary, as to the expense of rendering the house fit for habitation.

CASE STATED by the Recorder of Londonderry.

The facts of the case, the findings in the case stated, and the arguments of counsel appear sufficiently in the judgment of the Lord Chief Justice.

McVeigh Q.C. and *Porter* for the Corporation.

MacDermott for the respondents.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: The appellant is the executive sanitary officer of the Londonderry Corporation and has acted on its behalf throughout the proceedings which have culminated in this appeal by way of case stated. The respondents are the agents of the owner of a terrace dwelling-house situate at 13 Alma Place in the City of Londonderry and hereinafter referred to as "the premises." By notice dated June 23, 1953, the appellant, acting under section 110 of the Public Health (Ireland) Act, 1878, called upon the respondents to abate a nuisance alleged to exist on the premises by carrying out thereon certain specified works. This notice was not complied with and the appellant then caused a summons to be served on the respondents for enforcing the abatement sought. On September 24, 1953, the resident magistrate, acting under the powers conferred by the joint effect of section 110 and the two succeeding sections of the Act of 1878, found the nuisance complained of proved, ordered the execution of the work necessary to abate it and directed the respondents to pay costs and a fine of one shilling.

The respondents appealed from this order to quarter sessions and the appeal came on for hearing before the

learned Recorder of Londonderry on January 12, 1954. By that time some of the defects complained of had been made good and these may now be left out of account. Those remaining were confined to the wooden floor of the parlour or front room of the premises which was rotten and broken into numerous holes.

There can be no question but that this state of disrepair constituted a nuisance within the meaning of section 110 of the Act of 1878 and the respondents did not contend to the contrary or seek to challenge the order of the resident magistrate on any question relevant to proceedings properly initiated under that section. What they said was that the order was bad because in the circumstances section 110 had been made inapplicable by section 30 of the Planning and Housing Act (Northern Ireland), 1931 (1). The learned Recorder upheld this submission and ruled that the order appealed from be reversed and the summons dismissed. The question now to be decided is whether this determination was correct in point of law.

Before coming to the findings of fact it will be convenient to set out the terms of section 30 of the Act of 1931 (1). (His Lordship referred to the section and continued) :

(1) The Planning and Housing Act (Northern Ireland), 1931, s. 30 :—

" (1) Where a local authority, " upon consideration of the repre- " sentation of the medical officer " of health, or a report from any of " their officers, or other informa- " tion in their possession, are " satisfied that any dwelling-house " is in any respect unfit for human " habitation, they shall, unless they " are satisfied that it is not capable " at a reasonable expense of being " rendered so fit, serve upon the " person having control of the " house a notice requiring him . . . " to execute the works specified in " the notice and stating that, in the " opinion of the authority, those " works will render the house fit " for human habitation : Provided " that the person upon whom such " notice is served may . . . under- " take that the house shall not be " used for human habitation until " the authority on being satisfied " that it has been rendered fit for " that purpose cancel the under- " taking.

" (2) ..... "

" (3) Notwithstanding anything " contained in section one hundred " and ten of the Public Health " (Ireland) Act, 1878 (which relates " to notices requiring abatement of " a nuisance) the local authority " shall not serve a notice under that " section in any case to which this " section applies."

This text raises two points of construction, both of them relevant to the issue for decision. They may be stated thus:

(i) Do the words at the end of subsection (3) "in any case to which this section applies" refer to a case in which the local authority are satisfied that the dwelling-house is in any respect unfit for human habitation and that it is capable of being made so fit at a reasonable expense, or do they refer to a case which, on its facts, comes within the scope of the section although the local authority have either not considered it or not reached a conclusion upon it?

(ii) Do the words of subsection (1) "any dwelling-house is in any respect unfit for human habitation" comprehend a dwelling-house part but not all of which is unfit for human habitation?

I shall deal with these questions in the order stated and with such reference to the findings as is necessary to show the materiality of each.

First, as to (i). Whether section 30 applies in any case depends upon whether subsection (1) thereof applies and, read literally, that subsection only applies "where" the local authority concerned "are satisfied" as to certain matters. In this appeal one of the findings of fact is that the present appellant "was not at any time satisfied that the said dwelling-house was in any respect unfit for human habitation." This does not in terms refer to the Londonderry Corporation but it may be assumed that this finding would also apply to it and that, as the local authority in question, it had not reached any conclusion on the matters that have to be considered before the obligation to serve a notice under subsection (1) arises. In these circumstances it was said that, as the procedure provided by subsection (1) had not been put into operation by the local authority, the instant case was one to which section 30 did not apply and, accordingly, that subsection (3) did not preclude resort to the procedure initiated by the service of a notice under section 110 of the Act of 1878.

This view, though plausible, does not seem to me

to be sound. If it were it would mean that a local sanitary authority, if satisfied as to the existence of a nuisance within its district, could always circumvent the prohibition contained in subsection (3) of section 30 simply by omitting to do anything respecting the matters which bring subsection (1) into operation. I do not think that would accord with the policy of the Legislature. It is obvious that cases may often arise which would be within the ambit both of section 110 of the Act of 1878 and of section 30 of the Act of 1931, and whenever this happens it seems to me that the intention of the Legislature was not that the procedure to be followed should depend on what might be quite an arbitrary attitude on the part of the local authority, but that that sort of case should be dealt with under section 30 and not under section 110. I am therefore of opinion that the words of subsection (3) " in any case to which this section applies " contemplate something in the nature of an objective test with the court entitled to say that the facts bring the case within the scope of section 30 even though the local authority have given no consideration to or have reached no conclusion upon the situation from the point of view of that section. I do not think it follows from this that, if the local authority do consider the application of section 30 and are not satisfied as to the existence of the state of affairs necessary to bring it into operation, the court can review that conclusion in proceedings founded on section 110 of the Act of 1878. That is not this case and I express no opinion upon it except to say that section 30 plainly attaches considerable importance to a decision of the local authority taken upon a consideration of the material to which subsection (1) refers.

I am therefore of opinion that the conclusion of the learned Recorder cannot be justified in law merely on the ground that the Londonderry Corporation did not consider or take any step under section 30.

Next, as to (ii). What is meant by a dwelling-house which is " in any respect unfit for human habitation ? " For the appellant it was submitted that these words referred to the dwelling as an entity and were only

satisfied if, for any reason, the house as a whole was unfit for human habitation. Against this the respondents contended that " in any respect " was the equivalent of " as respects any part." The materiality of this issue arises from the fact that the learned Recorder, while finding that the parlour or front room of the premises was unfit for human habitation, does not find that the house as a whole was unfit for that purpose. I must return to this omission later, but if the appellant's contention on the construction of subsection (1) is sound and if the correct view of the findings is that the house as an entity is fit for human habitation, then—whatever view may be formed on other aspects of the case, such as the cost of repairs and the hardship to the owner of having to bear that cost—the case falls outside section 30 and is not one to which that section applies.

In support of the appellant's submission reliance was placed upon certain dicta in *Hall v. Manchester Corporation* (1), which are sufficiently summarised for present purposes by Lord Maugham in *Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust* (2), when he says: " The truth is, as was in effect " pointed out by Lord Dunedin and by Lord Parker in *Hall v. Manchester Corporation* (1) that when a house " is stated to be unfit for human habitation it is the " whole house that is being so described." The respondents, on the other hand, cited the decision of the House of Lords in *Summers v. Salford Corporation* (3). There it was held that the jamming of a bedroom window in a small house involved a breach of the undertaking implied by section 2 of the Housing Act, 1936, that the house would be kept " in all respects " reasonably fit for human habitation." " In all respects " fit " was said to be the converse of " in any respect " unfit " and our attention was directed in particular to two passages in the opinions delivered. The first of these is from the speech of Lord Wright and reads (4): " In these small houses it may be assumed that every

(1) (1915) 84 L.J. (Ch.) 732.
(2) [1937] A.C. 898, 915.
(3) [1943] A.C. 283.
(4) Ibid at 293.

" room is in full use, and I think that the statutory " condition is intended to ensure that every room is " fit for use. It was contended that it is the house, " and not every room in the house, which is required to " fulfil the condition, but, in my opinion, that con- " tention is inconsistent both with the language and " the object of the section. ' In all respects ' must " mean in all respects material to the enjoyment of the " tenement, and the unfitness of one room may be a " most material detraction from that enjoyment." The second occurs in the speech of Lord Romer and is as follows (1) : " If the windows in a room cannot be " opened or shut or cleaned, that room is not, in my " opinion, reasonably fit for human habitation. It is " even more unfit for human habitation if the occupant " of the house can only open or shut or clean the " windows at the risk of serious injury to himself, and, " if the room forms a substantial part of the house, it " must be held that the house as a whole is not ' in all " ' respects reasonably fit for human habitation.' "

In my opinion *Summers v. Salford Corporation* (2) does not really touch upon the question of construction now under discussion. It no doubt shows that the unfitness of a part may well mean the unfitness of the whole. But that is rather a question of fact and degree to be determined according to the nature and circumstances of the particular case. Here, were the stairs or the floor of the kitchen-living-room as rotten as the parlour floor it might well be difficult to resist the conclusion that the house as a whole was unfit for human habitation. But as matters stand it was, in my opinion, open to the learned Recorder, as the judge of fact, to come to a different determination.

As I read section 30 the answer to the point under consideration is to be found in the context. As in section 29 (which provides for demolition orders), the unit the subject of section 30 seems to me, from the language used, to be the house as a whole. Omitting for the moment the words to be construed, it is to be observed that the notice under subsection (1) must specify the works which " will render the house fit for

(1) [1943] A.C. at 297. (2) [1943] A.C. 283.

" human habitation " and that the proviso to that subsection refers to an undertaking that " the house " shall not be used for human habitation " until the local authority " on being satisfied that it has been " rendered fit for that purpose cancel the undertaking." These expressions are apt as references to the entire dwelling but are not so if the section is meant to be capable of operating where a part of the dwelling, but not the dwelling as a whole, is unfit for habitation Returning to the crucial words " any dwelling-house " is in any respect unfit for human habitation " I am unable to find anything therein to modify the view I have expressed. The reference is still to the dwelling-house and not to " the dwelling-house or any part thereof." It is true that in section 29 the corresponding phrase omits the words " in any respect." But I do not think this is significant. Section 29 deals with the house which cannot be made fit at a reasonable expense and which will, therefore, generally have a lot wrong with it. Section 30, on the other hand, deals with the house which can be made fit at a reasonable expense and which is therefore less likely to have so much amiss. It may thus be that the words " in any " respect " were inserted ex abundanti cautela to provide for cases where the uninhabitable state of the dwelling as a whole is due to some single or circumscribed defect as, for example, a leaking gas pipe or a dangerous stair. But however that may be, I do not think these words detract from the natural import of the expressions " dwelling-house " and " house " as used in the section. To ask if a dwelling is unfit for human habitation " in any respect " in the sense of " for any reason," does not seem to me to involve a strained or peculiar use of the common tongue, but I doubt if that could be said if what was meant was not " for any reason " but " as respects any part thereof."

I am accordingly of opinion that the appellant's contention is well founded and that on its true construction section 30 does not apply where a part of the dwelling, but not the dwelling as a whole, is unfit for human habitation.

This would be an end of the case if the learned Recorder had found that the premises as a whole were fit for human habitation At first I was inclined to think that his findings came to this as a matter of implication since, in addition to finding—(10)" That the said room " is unfit for human habitation " he has found—(12) " That the said premises are not in every respect unfit " for human habitation," (13) " That the respondent " was not at any time satisfied that the said dwelling " house was in any respect unfit for human habitation," and, (7c), that " The premises were in some respects " unfit for human habitation." On reflection, however, I am in doubt about this and, indeed, about whether the learned Recorder ever addressed himself to the question whether the premises *as a whole* were fit or unfit for human habitation. I am accordingly of opinion that the case must go back with a direction to reach a finding on this question and, having done so, to proceed as follows : (*a*) If the finding is that the premises as a whole were fit for human habitation the decision at quarter sessions is to be set aside as erroneous in point of law and the appeal from the resident magistrate dismissed ; (*b*) If, on the other hand, the finding is that the premises as a whole were unfit for human habitation, a further inquiry must be prosecuted to ascertain whether the premises could be made fit for human habitation at a reasonable expense ; (*c*) If it is found on such inquiry that the expense would be reasonable section 30 should be held applicable and the decision at quarter sessions reversing the order of the resident magistrate confirmed ; (*d*) But if it is found on such inquiry that the expense would not be reasonable section 30 should be held inapplicable, the decision at quarter sessions set aside and the appeal from the resident magistrate dismissed as at (*a*) above.

I should perhaps add that I have not overlooked the other findings of the learned Recorder as to the general condition of the premises and the cost of keeping them in repair or his expressed opinion that it was contrary to natural justice that the sanitary authority " could arbitrarily compel the owner to

" continue indefinitely an expenditure in excess of the " net rental, especially as it would not enhance the " value of the premises." On the view I take of the statutory position these matters do not arise on this appeal and I do not therefore comment upon them further than to say that in certain circumstances under existing legislation the owner of a tenanted house in really bad condition may be better off than the owner of one that is not so bad.

BLACK, L.J. : The statute which has given rise to the present appeal is the Planning and Housing Act (Northern Ireland), 1931. Section 29 of that Act is obviously modelled upon section 19 of the English Housing Act of 1930, a section now replaced by section 11 of the Housing Act, 1936. And similarly section 30 of the Northern Ireland Act is equally clearly modelled upon section 17 of the Act of 1930, now replaced by section 9 of the Act of 1936.

Section 30 (1) of the Act of 1931, following closely the wording of section 17 (1) of the Act of 1930, provides that where a local authority upon consideration of the representation of the medical officer of health, or a report from any of their officers, or other information in their possession, are satisfied that any dwelling-house is in any respect unfit for human habitation, they shall, unless they are satisfied that it is not capable at a reasonable expense of being rendered so fit, serve upon the person having the control of the house a notice requiring him to execute the works specified in the notice and stating that in the opinion of the authority those works will render the house fit for human habitation.

The contest in the present case has arisen by reason of the provisions of subsection (3) of section 30 which enacts that " notwithstanding anything contained in " section 110 of the Public Health (Ireland) Act, 1878 " (which relates to notices requiring abatement of a " nuisance) the local authority shall not serve a notice " under that section in any case to which this section " applies." The policy of this subsection, it may be

noted, is directly contrary to that of the English Acts. Section 18 (7) of the Act of 1930 expressly provided that no action taken under section 17 or section 18 of that Act should prejudice or affect any other powers of the local authority, and this provision is repeated in section 10 (7) of the Act of 1936.

In the present case a notice was served under section 110 of the Act of 1878 by the appellant as executive sanitary officer of the Londonderry Corporation requiring the respondents who were the owners of the premises, No. 13 Alma Place, Londonderry within the meaning of that Act to abate a nuisance on the said premises; and upon failure on the part of the respondents to comply with the requirements of this notice an order was made by a resident magistrate ordering certain repairs to be done and imposing upon the respondents a fine of 1/– and 30/– costs. From this order the respondents appealed to the Recorder who has stated the present case for the opinion of this court.

The contention of the respondents is that the case falls within the ambit of section 30 (1) of the Act of 1931, and that accordingly by reason of the provisions of subsection (3) of that section the local authority were not entitled to serve a notice under section 110 of the Act of 1878. The reasons for this attitude were, I presume, in the first place, that section 34 of the Act of 1931 confers a right of appeal to the county court against a notice served by a local authority under section 30 of the Act which the respondents in the present case prefer to pursue rather than to be subject proceedings brought under the Public Health Acts, and in the second place that failure to comply with a notice to abate a nuisance under section 110 of the Act of 1878 may result under section 112 in the imposition of a fine, and in the event of their failure to obey an order made by a magistrate under section 112 to abate the alleged nuisance may further subject them under section 114 to a continuing daily penalty. On the other hand if the local authority proceeded under section 30 of the Act of 1931, while no doubt upon non-compliance by the respondents with a notice

under that section which had not been quashed or varied the local authority might themselves proceed to carry out the necessary work at the respondents' expense, the respondents would not, by reason of their failure to comply with the notice, be exposed under the Act to anything in the nature of criminal or quasi-criminal proceedings or to any fine or penalty.

The first difficulty which appears to arise is to determine in what precise circumstances section 30 (3) of the Act of 1931 is to operate. The subsection says that the local authority shall not serve a notice under section 110 of the Public Health Act, 1878, in any case to which section 30 applies. To what cases does the section apply? On a strict grammatical construction it would seem that it would only apply if the local authority were satisfied that any dwelling house is in any respect unfit for human habitation and were not satisfied that it is not capable at a reasonable expense of being rendered so fit. It was accordingly suggested that if the local authority have not addressed themselves to those questions and have not come to the conclusions required by section 30 (1), then section 30 (3) cannot debar them from proceeding under section 110 of the Act of 1878. I cannot think that this interpretation of the section can be sound. By section 30 (3) the Legislature obviously intended that in certain circumstances it should not be permissible for the local authority to resort to section 110. This intention would be defeated if the local authority could set subsection (3) at naught simply by taking no action under subsection (1). In the normal course of their duties the sanitary officers of a local authority will report any case in which a nuisance exists. If the nuisance affects a dwelling house so that it may be in any respect unfit for human habitation it will in my opinion be the duty of the local authority to consider whether the case falls within section 30 (1). If they come to the conclusion that it does, it will then be their imperative duty to serve a notice under the subsection. The word used in the subsection is "shall." If they fail to consider the matter the

courts will in my view be entitled to consider whether the circumstances are such as to bring into operation the veto imposed by section 30 (3) upon proceedings under section 110 of the Public Health Act. It appears from the case stated that in the present case the local authority had not directed themselves to the question whether the case fell under section 30 (1).

Accordingly when the matter came before the courts and the point was raised on behalf of the respondents it became in my opinion the task of the courts to consider whether the house 13, Alma Place was, in the words of section 30 (1), "in any respect unfit for "human habitation."

Here, however, another difficulty arises. What exactly is meant by the phrase in section 30 (1) "that "any dwelling house is in any respect unfit for human "habitation"? The difficulty arises from the words "in any respect." If the question were simply whether a dwelling house was unfit for human habitation it is well established that what would have to be looked at is the dwelling house as a whole. Even although some parts of a house were defective the house could not be said to be unfit for human habitation unless viewed as a whole it was unfit to be inhabited: *Hall v. Manchester Corporation* (1); *Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust* (2). For the respondents however, it was argued that the effect of the words "in any respect" in section 30 (1) was to bring a house within the section if it was not in every respect fit for human habitation, that is to say if there was any defect, however slight, which interfered with the comfortable inhabitation of the house. A considerable portion of the flooring of the ground floor front room of No. 13 Alma Place is in a seriously defective condition, and it was accordingly contended that the house could not be said to be in every respect fit for human habitation. This is an attractive argument but on consideration I have come to the conclusion that it is not valid. Notwithstanding the words "in any respect"

(1) (1915) 84 L.J. (Ch.) 732. (2) [1937] A.C. 898, 915.

what section 30 (1) speaks of is a " dwelling house " which is unfit for human habitation. The question is whether the dwelling house is unfit. It may be unfit in any one of a variety of different respects. Defective flooring in one room may render a house unfit for human habitation or it may not. The question is one of fact and of degree. If there was a defect in the floor of a garret which could not conceivably be used either for living in or for sleeping in this could hardly, I should think, be legitimately regarded as rendering the house in any respect unfit for human habitation, whereas a serious defect in the floor of the kitchen of a kitchen house or a dangerously defective staircase could scarcely leave any alternative but to regard the house as unfit. This view appears to me to accord with that expressed by Lord Atkin in *Summers v. Salford Corporation* (1). In that case the section under discussion was section 2 of the Housing Act, 1936, which provides that in any contract for letting for human habitation a house under a specified rent there shall be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, *in all respects* reasonably fit for human habitation. Lord Atkin observes (2) " I accept the " view that, notwithstanding the provisions in section " 2 subsection 3 of the Housing Act, 1936 that 'the " ' expression " house " includes part of a house ', dis- " repair to a single room will not be sufficient unless " the effect of it is to render the whole house not " ' reasonably fit for human habitation ', but I should " suppose that in houses to which the Act applies it " would be difficult to confine the effects to one room " alone ". The later case of *Cochrane v. Chanctonbury R.D.C.* (3) indicates that the same view is also taken by the English courts with regard to the effect of the words " in any respect " in section 30 (1) of the Act of 1931. That was a case under section 9 (1) of the

(1) [1943] A.C. 283.
(2) [1943] A.C. at 289.
(3) [1950] 2 All. E.R. 1134.

English Housing Act of 1936, which as I have said corresponds closely to section 30 (1) of the Northern Ireland Act. In *Cochrane's* case (1), which like the present case was one of defective flooring, counsel for the local authority put forward the same contention as the respondents did in this court as to the effect of the words " in any respect ", but this contention failed to find acceptance by the English Court of Appeal. Somervell L.J. is reported as saying (2) : " The first " submission of counsel for the local authority was that " the judge went wrong in law in that he looked at the " house as a whole, asking the question : ' Is this " ' house as a whole unfit for human habitation ', " whereas the words of the Act are ' is in any respect " ' unfit for human habitation '. Counsel submitted " that where on the evidence certain new floor boards " are required or some boards require renewing, that " makes the house ' in a respect ' unfit for human " habitation. Secondly, he submitted that, there " thus being a defect which makes the house unfit in a " respect for human habitation, as a matter of law the " judge is wrong if he quashes instead of varying. *I do* " *not accept either of those propositions.* I will take the " second first." After dealing with the second proposition Somervell L.J. continues : " In the present " case the judge was entitled to take that line, and, " that being so, it is unnecessary for us to decide " whether the defect which was disclosed in the " evidence was one which, within section 9 (1), renders " the house ' in any respect unfit for human habita- " ' tion ' ".

I accordingly find myself in complete agreement both with the conclusions reached by the Lord Chief Justice and with the reasoning by which he has arrived at those conclusions. And as the terms of the case stated appear to me to leave it uncertain what the learned Recorder intended to find upon what this court considers to be the real problem, I agree that the matter should be remitted to him to determine in the

(1) [1950] 2 All. E.R. 1134. (2) Ibid. at 1135.

light of the guidance to be obtained from our judgments.

Appeal allowed : case remitted.

Solicitor for the Corporation : *A. W. Jack.*

Solicitors for the respondents : *Dickson & McNulty.*

J.P.

IN RE KATHLEEN McKEE (1).

Probate—Practice—Testator domiciled in Northern Ireland—Appointment of bank as sole executor—Bank registered as company in Republic of Ireland—Whether bank a trust corporation—Probate and Letters of Administration Act (Northern Ireland), 1933 (23 & 24 Geo. 5, c. 16), ss. 1, 4—Companies Act (Northern Ireland), 1932 (22 & 23 Geo. 5, c. 7), s. 335—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 380—Government of Ireland (Companies, Societies, etc.) Order, 1922 (S.R. & O. 1922, No. 184), art 4.

By section 1 of the Probate and Letters of Administration Act, 1933, probate may be granted to a trust corporation, and by section 4 (1) (*b*) a trust corporation is defined as, inter alia, "a company . . . "within the definition of the Companies Act". The same subsection defines Companies Act by reference to section 335 of the Companies Act (Northern Ireland), 1932, or section 380 of the Companies Act, 1929, and each of these sections defines a company as a company formed and registered under the Act itself or an "existing "company".

By section 335 of the Northern Ireland Act of 1932 "existing "company" means "a company formed and registered or deemed to have been registered in Northern Ireland" under the earlier Companies Acts. By the Government of Ireland (Companies, Societies, etc.) Order, 1922, a company registered at January 1, 1922, in Ireland under the Companies Acts shall, if its registered office is situate in Northern Ireland, be deemed for the purposes of the Companies Acts to be registered in Northern Ireland.

By section 380 of the Act of 1929 "existing company" means a company formed and registered under the earlier Companies Acts "but does not include a company registered under the said enact- "ments in Northern Ireland or the Irish Free State".

The Munster and Leinster Bank, Limited, was incorporated in 1885 under the Companies Act, 1862, and the registered office and head office was at all material times in the City of Cork, though it had branches in Northern Ireland.

Held, (i) that the Bank was not an "existing company" within section 335 of the Northern Ireland Act of 1932 because it was not formed and registered in Northern Ireland, nor could it be deemed to be registered in Northern Ireland by virtue of the Order of 1922 since the registered office was not in Northern Ireland;

(ii) that the Bank was not an "existing company" within section 380 of the United Kingdom Act of 1929 because it was registered in the Irish Free State;

(1) In the Queen's Bench Division (Probate) before Lord MacDermott L.C.J.: Jan. 27, 1955.

(iii) that accordingly the Bank was not a trust corporation within the meaning of section 4 (1) (*b*) of the Probate and Letters of Administration Act (Northern Ireland), 1933.

The provision in section 4 (1) (*a*) of the Act of 1933 that a trust corporation shall also mean "a corporation appointed by the High "Court in any particular case to be a trustee" does not empower the appointment of a corporation not otherwise qualified as a trust corporation unless there is some particular reason on the merits for making such appointment.

MOTION for an order that the Munster and Leinster Bank, Ltd., be at liberty to depose on oath that it is a trust corporation for the purpose of extracting a grant of probate of the will of Kathleen McKee, deceased.

Miss Kathleen McKee died on April 22, 1953, having by her last will dated April 17, 1953, appointed the applicant bank to be her sole executor and trustee. At the time of her death she was domiciled in Northern Ireland and her assets, other than household goods and personal effects, consisted of a considerable leasehold and freehold estate in Belfast and Bangor and a large sum of money deposited at the applicant's branch bank at High Street, Belfast.

The applicant bank was incorporated on September 19, 1885, under the Companies Acts 1862 to 1880. The share capital at the date of incorporation was £1,000,000 divided into 200,000 shares of £5 each, which figure has since been increased. At an extraordinary general meeting of the bank held on December 1, 1906, a resolution was passed authorising it to undertake trust business. This resolution was confirmed by an order of the High Court of Justice in Ireland made on March 28, 1907, with a proviso that any trust property, assets or moneys to be dealt with must be situate within the jurisdiction of the High Court of Justice in Ireland. This order had since been lost and no copy could be obtained owing to the destruction by fire of the court records at the Four Courts in Dublin in 1922. The registered office of the applicant bank and its head office was at all times in the Republic of Ireland.

The applicant applied to the High Court under the provisions of section 1 (i) (*a*) of the Probate and Letters

of Administration Act (Northern Ireland), 1933, for a grant of probate of the said will, and for leave to depose on oath that it was a trust corporation within the meaning of section 4 (1) (*b*) thereof (1).

Patton Q.C. and *McGonigal* for the applicant bank. The applicant is a corporation " constituted under the " law of the United Kingdom " within the meaning of those words contained in section 4 (1) (*b*) of the Probate and Letters of Administration Act (Northern Ireland), 1933. Though the word " constituted " can have a continuous meaning—see *In re East and West India Dock Co.* (2)—it must also include a reference to the origin of the company, and regard must be had to the extent of the United Kingdom and the law existing at the time of its constitution. Though at present it is a foreign corporation there is no doubt that it was brought into being under the law of the United Kingdom as it then was. The case of *In re Barlow* (3) in which a similar application was refused is distinguishable because there the applicant bank was incorporated

(1) By the Probate and Letters of Administration Act (Northern Ireland), 1933, s. 4 (1) :

" (1) In this Act, unless the con- " text otherwise requires the follow- " ing expressions have the meanings " hereby assigned to them, that is " to say :—

" ' Trust corporation ' means—

" (*a*) a corporation appointed by " the High Court in any parti- " cular case to be a trustee ; or

" (*b*) any corporation constituted " under the law of the United " Kingdom or any part thereof, " and empowered by its constitu- " tion to undertake trust busi- " ness, and having a place of " business in the United King- " dom, and being either—

" (i) . . . .

" (ii) a company (whether re- " gistered with or with- " out limited liability) " within the definition " contained in the Com- " panies Act, having a " capital (in stock or " shares) for the time " being issued of not less " than two hundred and " fifty thousand pounds, " of which not less than " one hundred thousand " pounds shall have been " paid up in cash; . . . . . "

" ' Companies Act ' means section " three hundred and thirty-five " of the Companies Act (Nor- " thern Ireland), 1932, passed by " the Parliament of Northern " Ireland, or section three hun- "dred and eighty of the Com- " panies Act, 1929, passed by " the Parliament of the United " Kingdom : "

(2) (1888) 38 Ch. D. 576, 594.

(3) [1933] P. 184.

in 1738, before the Union, and had not been empowered to undertake trust business until after the establishment of the Irish Free State.

In 1933 an application similar to the present was granted in England by Langton J. in the unreported case of *In re John David O'Connor* (1). The position was slightly different as the meaning of "company" is at large in the corresponding English code. It cannot be contended that the applicant comes within the definition of "company" contained in section 335 of the Companies Act (Northern Ireland), 1932. The Companies Act, 1929, section 380 excludes companies "registered in the Irish Free State", but in the case of the applicant registration took place, not in the Irish Free State, but in Ireland, and there is no provision for "deeming" a company to have been registered in the Irish Free State such as there is in Northern Ireland.

Lowry for the Chief Probate Registrar. The principal difficulty is the definition of "company" in the Companies Act, 1929. "Deemed to be registered" in the Government of Ireland (Companies, Societies, etc.) Order, 1922, article 4, may refer only to the single act of registration which in this case took place before the Irish Free State existed. On the other hand the reason for such a phrase and for making the adaptation Order may be that Irish Companies not transferred to the Northern Ireland register would simply remain on the Dublin register and become in due course "registered in the Irish Free State"—see article 6 of the Order. As to assets within the jurisdiction of the High Court of Justice in Ireland, this requirement must be read for the purpose of the application as referring to the High Court of Justice in Northern Ireland—see the Government of Ireland Act, 1920, sections 38 and 40.

LORD MACDERMOTT L.C.J. stated the facts and continued: If the applicant is not a trust corporation

(1) Unreported.

the application cannot succeed as before 1933 a grant would not issue to a corporation alone. The definition of a trust corporation is set out in section 4 (1) of the Probate and Letters of Administration Act (Northern Ireland), 1933, and paragraph (*b*) thereof provides that a trust corporation means "any Corporation "constituted under the law of the United Kingdom "or any part thereof, and empowered by its con- "stitution to undertake trust business, and having a "place of business in the United Kingdom, and being"—I omit what is not now material—"(ii) a "company (whether registered with or without limited "liability) within the definition contained in the "Companies Act, having a capital (in stock or shares) "for the time being issued of not less than £250,000 "of which not less than £100,000 shall have been paid "up in cash."

The first condition to be satisfied is that the applicant should be a corporation constituted under the law of the United Kingdom. This corporation was constituted in 1885 and registered as a company in Dublin. If the word "constituted" means "which was con- "stituted" that condition is fulfilled; but if it means "which is now constituted" there is a difficulty since the applicant is now a foreign corporation and its constitution is a matter for the courts of the Irish Republic. This is an interesting question and one which was looked at by Lord Merrivale in *In re Barlow* (1), but I do not need to decide it for the purpose of these proceedings, and I shall simply assume without expressing an opinion on the matter that the applicant fulfils the requirement of being "constituted under the law of the United Kingdom." I proceed, therefore, to consider the second condition which arises from the words which come next. Is the applicant empowered by its constitution to transact trust business?

In 1907 the applicant made the necessary application to the High Court of Justice in Ireland for an alteration of its memorandum so as to enable it to undertake trust business, and the order of the court authorized the

(1) [1933] P. 184.

applicant to do so with the addition of a proviso to the effect "that nothing in this subsection contained shall "authorize the Company or any officer thereof to "undertake any trust or act as executor or administrator or treasurer in any case in which no portion of "the trust property assets or moneys respectively to "be dealt with is situate within the jurisdiction of the "High Court of Justice in Ireland." At the time when this extension of powers was granted the High Court of Justice in Ireland had jurisdiction throughout the island. Nothing which happened thereafter has, in my opinion, done anything to reduce the powers of the applicant in Northern or Southern Ireland. In my view the applicant is empowered by its constitution to transact trust business in this jurisdiction, and I am therefore prepared to hold that the second condition is satisfied.

On the assumption that the first and second conditions are fulfilled I come to the third. Has the applicant a place of business in the United Kingdom? On any view of the construction of this section it undoubtedly has. The next condition to be satisfied is to be found in section 4 (1) (*b*) (ii) of the 1933 Act. Is the applicant "a company . . . within the definition "contained in the Companies Act, having a capital . . . "for the time being issued of not less than £250,000 of "which not less than £100,000 shall have been paid "up in cash"? The applicant is a limited company and so far as its capital is concerned there is no difficulty; but the question remains whether it is a company within the definition.

The expression "Companies Act" is defined by section 4 of the Act of 1933 as meaning "section three hundred and thirty-five of the Companies Act (Northern Ireland), 1932, passed by the Parliament of Northern Ireland, or section three hundred and eighty of the Companies Act, 1929, passed by the Parliament of the United Kingdom." When one turns to the Companies Act (Northern Ireland), 1932, s. 335, one finds that a company is defined as "a company formed "and registered under this Act or an existing company." The applicant was not formed under the 1932

Act, and one therefore turns to the definition of " existing company " which is : " A company formed " and registered or deemed to have been registered in " Northern Ireland under the Joint Stock Companies " Acts, the Companies Act, 1862, or the Companies " (Consolidation) Act, 1908."

The present applicant was not formed and registered under those Acts or any of them in Northern Ireland, and to decide whether it is to be " deemed to have been " registered in Northern Ireland " one has to look at the Government of Ireland (Companies, Societies, etc.) Order, 1922, article 4 of which provides :

" Any company, partnership or persons registered " at the appointed day in Ireland under any " of the enactments to which this part applies, " shall—

" (*a*) in the case of a company, if its registered " office is situate in Northern Ireland ;

" (*b*) in the case of a partnership or person if the " principal place of business is situate in Nor- " thern Ireland ;

" be deemed for the purpose of the said enactments " to be registered in Northern Ireland."

This does not cover the applicant whose registered office was never in Northern Ireland and whose principal place of business was at all material times in Cork. Thus the definition in the Northern Ireland Act of 1932 does not assist the applicant. The definition of " company " in the Companies Act, 1929, section 380 is in different terms, but it is similar in broad outline to the definition contained in the Northern Ireland Act. There " existing company " is defined in subsection (1) as :—" a company formed and registered under the " Joint Stock Companies Acts, the Companies Act, " 1862, or the Companies (Consolidation) Act, 1908, " but does not include a company registered under the " said enactments in Northern Ireland or the Irish " Free State."

The words " but does not include a company " registered in Northern Ireland or the Irish Free " State " are crucial. Mr. Patton submits that the applicant is not outside the definition because the

original registration was not effected in the Irish Free State, but in Ireland, before the existence of the Irish Free State. If that were the correct way of looking at the definition, then, on the assumptions that I have made, it would appear that the applicant was a trust corporation. This is an important question for the applicant and I would have reserved my judgment had I felt any real doubt in the matter. As it is, however, I do not think that the position will be clarified by further delay. I consider that what the definition was intended to do was to exclude companies which were then registered in Northern Ireland or the Irish Free State from the operation of the Companies Act, 1929. This exclusion makes the Act apply only to companies registered in Great Britain. The Act was not intended to regulate companies registered in other jurisdictions, and it is, to my mind, quite impossible to read "re-" gistered" as meaning merely "which was originally "registered." If that is right, the applicant is not a "company" within the appropriate definition and therefore cannot be a trust corporation under section 4 (1) (*b*) of the Act of 1933.

A further question arises as to whether the applicant can be brought in as a trust corporation under section 4 (1) (*a*) of that Act, which provides that a trust corporation shall also mean "a corporation appointed by the "High Court in any particular case to be a trustee." If I appointed the applicant a trustee just for the purpose of making it a trust corporation I would be doing something for which there is no precedent so far as I am aware. It would be different if there were some particular reason on the merits for appointing the applicant to be a trustee, but in my view, it would not be proper to do so simply because the applicant does not come within section 4 (1) (*b*).

I wish to make it clear that I have reached my conclusion entirely on the construction of the Act and without reference to the ability of the applicant to carry out the duties which it seeks to perform, or to its standing. I would have no difficulty on the merits in acceding to this application. I should also say that I have been referred to an unreported decision of

Langton J. in 1933 in the case of *In re O'Connor* (1), giving liberty to the applicant to apply for probate. But in England, as Mr. Patton has properly pointed out, the word "company" seems to be used in an unrestricted sense which makes it unnecessary to be bound by the definitions contained in the Companies Acts. Therefore I do not regard *In re O'Connor* (1) as dealing with the difficult point with which I am confronted in the present application.

I am accordingly of opinion, for the reasons stated, that the applicant is not a trust corporation within the meaning of paragraph (*b*) of Section 4 (1) of the Probate and Letters of Administration Act (Northern Ireland), 1933, and that no sufficient ground exists for appointing the applicant a trustee under paragraph (*a*) thereof. The application is, therefore, refused.

Application refused.

Solicitors for the applicant : *Joseph Donnelly & Co.*
Solicitor for the respondent : *Chief Crown Solicitor.*

S.M.M.

(1) Unreported.

NOBLE v. ELECTRICITY BOARD FOR NORTHERN IRELAND (1).

Pleading—Particulars—Negligence.

It is not sufficient in answer to a request for the particulars of the defendant's failure to provide any or proper equipment for the plaintiff's work, to reply that the defendant had failed in "all "respects necessary to obviate against and prevent the dangers and negligence complained of in this action".

MOTION for an order that the plaintiff make further and better answer to a notice for particulars.

The plaintiff was employed by the defendants as a patrol man and on August 19, 1953, when attempting to get through a closed thorn hedge into a field in order to inspect a cable, he fell and sustained personal injuries. In his statement of claim he made the following allegations of negligence on the part of the defendants:

(*a*) Failing to provide safe access;
(*b*) Failing to make any or adequate provision in the said Way Leave Agreement for means of access to the said lands for the purpose of inspection and maintenance;
(*c*) Failing to provide any or proper equipment for the said work;
(*d*) Failing to give any or adequate instructions for the carrying out of the said work;
(*e*) Failing to supervise adequately or at all;
(*f*) Failing to employ a safe system of work by reason of the foregoing.

The defendants asked for further and better particulars of "the respects in which the defendants are "alleged to have failed as set out in paragraph (*c*) of "the particulars of negligence", and the plaintiff replied: "All respects necessary to obviate against "and prevent the dangers and negligence complained "of". A district engineer in the employ of the

(1) In the Queen's Bench Division before Sheil J.: June 4, 1954.

defendants said on affidavit : " I am unable to say " from my experience as an engineer what equipment " it is possible for the plaintiff to allege that the " defendants failed to provide, or in what respects he " can allege that the defendants so failed ".

Lowry for the defendant. The defendant should have an opportunity to get ready to meet the plaintiff's case, whatever it may be. He is entitled to know whether or not it is alleged that his system is lacking in aspects where other systems have precautions : *Paris v. Stepney Borough Council* (1) and *Drummond v. British Building Cleaners* (2). It is not sufficient for the plaintiff to state merely a general heading of negligence without giving any indication of the cause of complaint.

McGonigal for the plaintiff. The plaintiff's case is that there was complete failure to provide equipment and he is entitled to make that allegation without attempting to show what steps the defendants ought to have taken : *Manchester Corporation v. Markland* (3). The only type of case in which it has been suggested that the affirmative type of pleading is necessary, is that in which it is alleged that there was failure to provide a safe system of working : *Colfar v. Coggins and Griffiths* (4). The plaintiff has given all possible particulars in this case.

Sheil J. : The objects of pleadings and particulars is to bring the issues clearly before the court, and I am of opinion that the plea in this case was too general and the answer to the request for particulars quite illusory and meaningless. I consider that this case is quite different from *Manchester Corporation v. Markland* (3) in which there were obviously many things the defendant could have done in order to lessen the risk of accident. In the present case, on the other hand, I cannot readily think of anything which ought have been provided under particular (*c*) and therefore

(1) [1951] A.C. 367, 382.
(2) [1954] 1 W.L.R. 501.
(3) [1936] A.C. 360, 364.
(4) [1945] A.C. 197, 203.

consider that the defendants are likely to be taken by surprise at the trial and are entitled to their order.

Application granted.

Solicitor for the defendants : *Henry J. Catchpole.*

Solicitor for the plaintiff : *E. Malachy Doris.*

S.M.M.

McCONNELL v. BELFAST CORPORATION
O. D. CARS LTD. v. BELFAST CORPORATION (1).

High Court—Meaning—Whether judge sitting alone competent to hear special case stated—Acquisition of Land (Assessment of Compensation) Act, 1919, (9 & 10 *Geo.* 5, *c.* 57), *s.* 6.

A judge sitting alone is not competent to hear a special case stated on a point of law arising out of proceedings under the Acquisition of Land (Assessment of Compensation) Act, 1919.

Semble : " High Court " means a court sitting in banc except in cases coming within the scope of section 44 of the Judicature (Ireland) Act, 1877, or where otherwise specially provided by Rule or Statute.

CASE STATED by an official arbitrator under section 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919.

Section 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919, empowers an official arbitrator to state a special case for the opinion of the " High " Court " on any question of law arising in the course of proceedings before him, and provides that the decision of the High Court upon any case so stated shall be final and not subject to appeal to any other court.

On two applications for compensation for injurious injury under the Planning Acts, difficult questions of law arose and were submitted by the official arbitrator for the opinion of the High Court in the form of special cases stated. The two cases were assigned to a judge sitting alone to be tried together, and when they came on for hearing a preliminary point was taken that they should be before a Divisional Court.

Patton Q.C. and *Lowry* for the applicant in the first case. It is regretted that this preliminary point must be taken but in view of the fact that there can be no appeal it is a very important matter. It is not competent for a judge sitting alone to hear these cases because section 6 of the Acquisition of Land (Assess-

(1) In the Queen's Bench Division before Sheil J. : April 18, May 3, 1955.

ment of Compensation) Act, 1919, provides that they be stated for the opinion of the " High Court ", and it is submitted that unless otherwise indicated the word " court " means a court sitting in banc : *Baker v. Oakes* (1) ; *In re Davidson* (2). In England the position is different as appears from the case of *Hewitt v. Essex County Council* (3), but that decision is authority for saying that it is preferable to have cases of this nature tried by a Divisional Court in view of the fact that there is no appeal. The difference between the positions in England and Ireland appears to be that in England it requires an order to take jurisdiction away from a single judge, while in Ireland an order is required to give such jurisdiction.

Section 44 of the Judicature (Ireland) Act, 1877, does not confer jurisdiction in this type of case as there was no similar procedure prior to that Act. There are, of course, cases where a particular Act or rule does give jurisdiction to a single judge : Annual Revision of Rateable Property (Ireland) Amendment Act, 1860, s. 12 ; Stamp Act, 1891, s. 13 ; Finance Act, 1894, s. 10 ; Income Tax Act, 1918, s. 149 (2) (*c*). In fact, in Ireland, the practice has been to bring all such cases before a Divisional Court, even though they could be heard by a single judge.

McConnell for the applicant in the second case.

McVeigh Q.C. and *Gibson* for the respondent. It is reasonably clear from the terms of Order 34, and the footnotes thereto in Wiley's Practice, that a plurality of judges is contemplated to hear special cases stated. The matter would be beyond doubt were it not for the *Essex County Council* case (3), but that case may be explained by the existence of a different procedure in England. The fact that some Acts make special provision for cases stated to be heard by a single judge would seem to indicate that in the ordinary way a divisional court is necessary. On the other hand it would sometimes be difficult to say

(1) [1877] 2 Q.B.D. 171.
(2) [1899] 2 Q.B. 103.
(3) (1927) 44 T.L.R. 111.

whether any particular provision was directed to conferring jurisdiction or laying down the procedure. Section 149 of the Income Tax Act, 1918, could be read either way.

Cur. adv. vult.

SHEIL J.: Section 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919, empowers an official arbitrator to state, at any stage of the proceedings before him, in the form of a special case for the opinion of the High Court, any question of law arising in the course of the proceedings, and the decision of the High Court upon any case so stated shall be final and conclusive and shall not be subject to appeal to any other court.

In the two cases now before me there is no question about amount, as such, but what appear to be quite difficult questions of law have been submitted by the arbitrator. It would appear that at the present stage an appeal under section 46 of the Planning and Housing Act (Northern Ireland), 1931, is not involved, and accordingly it would appear that my decision—if I, sitting alone, can hear these cases—is final. Some suggestion has been made about a possible appeal on the basis that section 5 of the Government of Ireland Act, 1920, has been or may be infringed, but that is not something on which I can come to any conclusion. There is therefore placed on me a most serious responsibility and when Mr. Patton challenges my jurisdiction to hear the cases alone the challenge must be carefully considered.

The High Court of Justice in Northern Ireland was established by sections 38 and 40 and the Seventh Schedule of the Government of Ireland Act, 1920, and it acquired in Northern Ireland all the jurisdiction previously exercised by the High Court of Justice in Ireland and by the judges of that court. The High Court of Justice in Ireland was created by the Judicature (Ireland) Act, 1877, and section 44 of that Act preserved to a judge of the High Court any jurisdiction vested by the Act in the High Court in cases which

before the passing of the Act might have been heard by a judge alone. The section further provided that Rules of Court might direct or authorise cases to be heard by a judge alone and that in all such cases any judge sitting in court should be deemed to constitute a court. Section 45 provided that cases which could not properly be heard by a single judge should be heard by a Divisional Court, while section 46 made provision for all other business on the common law side by directing that business thitherto transacted by the Court sitting in banco, was to be dealt with by Divisional Courts.

I am satisfied on the authorities cited by Mr. Patton, particularly *Baker v. Oakes* (1), and *In re Davidson* (2), that saving some exception in a Rule of Court or Statute "court" means a tribunal of more than one judge, and while Order 34 is not applicable in this case Mr. McVeigh, who appears for the Corporation, presented a helpful argument at my request in the course of which he drew my attention to the contrast in that Order between "the court" and "a judge."

I have been unable to find any statute which confers on one judge the onerous jurisdiction imposed by the Act of 1919. There is no statutory provision applicable to the High Court of Justice in Northern Ireland equivalent to section 17 of the Appellate Jurisdiction Act, 1876, or section 60 of the Supreme Court of Judicature (Consolidation) Act, 1925, in England. Consequently in Northern Ireland when the Legislature desires to impose on a judge alone any jurisdiction given to the High Court specific provision to that effect has been made, as is seen for instance by reference to the Annual Revision of Property (Ireland) Amendment Act, 1860, section 12, and section 149 (2) (*c*) of the Income Tax Act, 1918.

When one comes to consider Rules of Court, Order 59, rule 60 and Order 59A, rule 9, (read with rule 4), appear to be relevant. They cannot, however, both apply since each purports to deal with a case "not otherwise provided for." Which rule then does

(1) (1877) 2 Q.B.D. 171. (2) [1899] 2 Q.B. 103.

apply? I have considered the two with the best care I could give to the problem they raise. The words of Order 59, rule 60, are apt to cover the present cases, the rule applying "to every case which may be stated "for the opinion of the Supreme Court or any division "thereof pursuant to the provisions of any Statute for "the time being in force and which is not otherwise "provided for." There is not in the Rules of the Supreme Court any rule which could be held to provide for these present cases until Order 59, rule 60, is reached but that cannot be said when Order 59A is reached.

In my view the prior Order and rule apply and I am of opinion that I should decline jurisdiction, there being no provision thereunder such as is contained in Order 59A, rule 4. I may say that I am not firmly set in this view, but even in a matter of doubt, bearing in mind the observations of Sankey J. in *Hewitt v. Essex County Council* (1) as to the importance of these cases, I am not prepared to resolve the doubt by assuming jurisdiction to myself alone.

Preliminary objection upheld.

Solicitors for the applicant in the first case: *C. A. MacKenzie & Co.*

Solicitors for the applicant in the second case: *N. & F. Tughan & Walmsley.*

Solicitor for the respondent: *Samuel Love.*

S.M.M.

(1) (1927) 44 T.L.R. 111.

STITT v. BELFAST CORPORATION (1)

Local government—Fire hydrant—Injury to person on highway—Liability of local authority—Belfast Water Act, 1840 (3 & 4 *Vict., c. lxxix*), *s.* 130—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict., c.* 17)—*Belfast Water Act*, 1865 (28 & 29 *Vict., c. clxxxix*), *s.* 3—*Belfast Water Act*, 1879 (42 & 43 *Vict., c. clxxii*), *s.* 25—*Fire Services* (*Emergency Provisions*) *Act* (*Northern Ireland*), 1942 (6 & 7 *Geo.* 6, *c.* 5)—*Fire Services Act* (*Northern Ireland*), 1947 (10 & 11 *Geo.* 6, *c.* 10), *s.* 7—*National Fire Service* (*General*) *Regulations* (*Northern Ireland*), 1942 (*S.R. & O.* 1942 (*N.I.*) *No.* 49), *art.* 9 (2).

The Belfast Corporation does not owe any duty at common law or by statute to prevent injuries caused by fire hydrants installed by the Belfast Water Commissioners under section 130 of the Belfast Water Act, 1840.

TRIAL of a preliminary issue in an action for damages for personal injuries.

On September 15, 1953, the plaintiff, an infant aged six years, received injuries to her right hand when the cast iron lid of a fire hydrant fell on it. The hydrant was situate in the pavement of Watt Street, Belfast. The defendant Corporation, who are not the water authority for the City of Belfast, were sued in this action and in their defence they averred that they owed no duty to the plaintiff in respect of the hydrant in question, which had been installed by the Belfast Water Commissioners in 1929. By an order of the court dated January 14, 1955, it was directed that the question of whether or not the defendants were responsible for the hydrant should be tried as a preliminary issue.

Stewart Q.C. and *Meenan* for the plaintiff.

Gibson for the defendant.

Cur. adv. vult.

(1) In the Queen's Bench Division before Sheil J.: April 27, May 18, 1955.

SHEIL J.: In this action the plaintiff who is a minor has alleged that on or about September 15, 1953, she sustained personal injuries by reason of negligence and/or nuisance on the part of the defendants. It is alleged that while the plaintiff, then aged six years, was playing in Watt Street, Belfast, a heavy cast iron lid or cover over a fire hydrant on the pavement of that street fell on her right hand so severely damaging the index finger that the finger had to be amputated in hospital.

The statement of claim is quite lengthy, but it is unnecessary further to consider it than to set out the above allegations. This is so because in their defence the defendants have alleged (inter alia) that the fire hydrant in question was a fire-plug which had been fixed and placed in the said pavement in or about the year 1929 by the Belfast Water Commissioners under the statutory powers and duties of the said Commissioners, and the defendants maintain that by reason of certain statutory provisions they (the defendants) are not and cannot be liable in law.

The matter comes before me by way of trial of a preliminary issue in accordance with an order dated January 14, 1955, made by Porter L.J. It has been conceded by counsel for the defendants that if I decide that there is a legal obligation on the defendants to provide and/or maintain the said hydrant and its lid or cover, the defendants are liable in damages On the other hand counsel for the plaintiff has admitted as proved the averment that the hydrant and cover were placed in the pavement by the Belfast Water Commissioners in 1929 for the purpose of fire prevention and extinguishment. It is necessary therefore to consider the history of water supplies in Belfast.

In 1840 the Belfast Water Act transferred from the Belfast Charitable Society to Water Commissioners the powers and duties of supplying water to the inhabitants of Belfast. Section 130 required the Commissioners upon carrying and laying down any main pipe for the supplying of water, at such time to fix and place or cause to be fixed and placed one or more proper and sufficient fire-plug or fire-plugs

supplied with water from such main for the supply of water for the extinguishing of fires. No provision was made for the care or maintenance of the fire-plugs.

The next statute dealing with water supplies in Belfast was a local Act of 1865, section 3 of which enacted that the provisions of the Waterworks Clauses Act, 1847, (except certain parts thereof with which we are not concerned) should apply to and be incorporated with and form part of the Act. In like manner the Belfast Water Acts of 1874 and 1879 incorporated most of the Act of 1847.

Now the Act of 1847 went much further than had gone the Act of 1840 in making provision against fire. Sections 38 and 39 required the Undertakers at the request of the Town Commissioners to fix proper fire-plugs in the main and other pipes belonging to the Undertakers and to renew and keep in effective order all such fire-plugs, while section 40 directed that the expense of fixing, placing and maintaining them in repair should be paid by the Town Commissioners. After 1865, therefore, it may well have seemed that section 130 of the local Act of 1840 was spent, since it will be remembered that it made no provision for cost of installation of fire-plugs and no provision at all for their care or maintenance. However, if it were spent, it certainly was revived by section 25 of the local Act of 1879, which declared that section 130 should be deemed (notwithstanding anything in any Act relating to the Commissioners) to be and to remain in force, and that nothing in any Act relating to the Commissioners should be deemed to require the cost of any fire-plugs provided under the section or any expense connected therewith to be defrayed by the Corporation of Belfast.

The position then must be taken to be that under the 1840 Act the Water Commissioners *when laying a main* were required at their own expense to fix fire-plugs, while under the incorporated Act of 1847 the Town Commissioners could require the Water Commissioners *at any time* to fix fire-plug in mains or other pipes and maintain them, the Town Commissioners being responsible for the cost.

So matters remained until 1942 when the Parliament of Northern Ireland passed the Fire Services (Emergency Provisions) Act. I mention this Act because Mr. Stewart for the plaintiff has placed much reliance on the Fire Service (General) Regulations (Northern Ireland), 1942, made under that Act. In particular, he has relied on article 9 (2) of the Order as showing that the local authority (in this case the defendants) had the property in fire-plugs. I do not accept that. The Act of 1942 did not confer on any local authority any ownership not thitherto possessed by such local authority, and it certainly did not repeal either section 130 of the 1840 Act or the provisions of the incorporated sections of the Act of 1847. Additionally, it is to be remembered that the 1942 Act only enabled the then Ministry of Public Security to make regulations and only for the period of the emergency. I do not think the Statutory Rule and Order transferred or purported to transfer or vest any property in the defendants; if it did the Order was to that extent invalid.

Mr. Stewart, however, puts the matter further and has relied on section 7 (1) of the Fire Services Act, 1947. At first and, indeed, at second sight this subsection seems to impose an absolute duty on the defendants as fire authority to provide and maintain fire hydrants. But section 130 of the 1840 Act is not repealed, and sub-section 3 of the same section 7 recalls me to subsections 38, 39 and 40 of the incorporated Act of 1847 which, as we have seen, required the Water Commissioners to provide and maintain fire-plugs. The effect of subsection 3 is to transfer to the fire authority the obligation to pay for the provision and maintenance of fire-plugs which, under the subsections, have been renamed fire hydrants. The fire authority in Belfast is the county borough council of Belfast: see section 12 of the Fire Services (Amendment) Act, 1950. Subsections 3 and 4 of the 1947 Act, show that the incorporated parts of the 1847 Act are very much alive.

What then is the difference between subsection 1 and subsection 3? They can only be reconciled by

deciding that subsection 1 must be taken to apply in cases where the relevant section of the Waterworks Clauses Act, 1847, have never been incorporated. That being so, and it having been admitted that this fire hydrant was placed in position in 1929 by the Water Commissioners, I hold that in respect thereof the defendants did not owe any duty to the plaintiff by statute or at common law.

Judgment for defendants on preliminary issue.

Solicitor for the plaintiff : *D. P. Marrinan.*

Solicitor for the Corporation : *Samuel Love.*

S.M.M.

MINISTER OF AGRICULTURE v. CARRAGHER (1)

PRACTICE NOTE.

Summary jurisdiction—Procedure—Service of Summons—Complaint by Minister of the Crown—Service by police constable—Petty Sessions (Ireland) Act, 1851 (14 & 15 *Vict., c.* 93), *s.* 12 (2).

A summons applied for by the Minister of Agriculture initiating forfeiture proceedings under the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, was issued by a resident magistrate who made an endorsement thereon authorising service of the summons by a named constable of the Royal Ulster Constabulary. A Divisional Court of the Queen's Bench Division held, following *Hannam v. Morrissey* (2), that a police constable was not a person whom the complainant could "employ" within the meaning of section 12 (2) of the Petty Sessions (Ireland) Act, 1851, and therefore could not be validly appointed under that section to effect service of the summons.

J.P.

(1) In the Queen's Bench Division before Lord MacDermott L.C.J. and Sheil J.: March 7, 1955.

(2) [1908] 2 I.R. 9.

MINISTER OF AGRICULTURE v. FINNEGAN (1)

PRACTICE NOTE.

Summary jurisdiction—Procedure—Service of summons—Service at defendant's house on visiting relation—Petty Sessions (Ireland) Act, 1851 (14 & 15 *Vict., c.* 93), *s.* 12 (3).

A summons issued in forfeiture proceedings under the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, was served at the defendant's premises when the defendant was absent by a copy being handed to a married sister of the defendant who lived in the Republic of Ireland and was making a social visit to the defendant's premises for the day. The sister handed the copy of the summons to the defendant later on the same day at her home in the Republic of Ireland. The Court of Appeal held that on these facts the sister was not an " inmate " of the defendant's premises for the purpose of section 12 (3) of the Petty Sessions (Ireland) Act, 1851, and that accordingly the service was invalid.

J.P.

(1) In the Court of Appeal before Porter and Black L.JJ. and Sheil J. : March 31, 1955.

McALLISTER v. WILSON (1)

Practice—Default in delivery of statement of claim—Application to dismiss for want of prosecution—Delivery before hearing—Amendment of notice of motion—Retrospective effect of order—R.S.C. Or. 20, *r.* 1—*R.S.C. Or.* 27, *r.* 1—*R.S.C. Or.* 52, *r.* 11—*R.S.C. Or.* 64, *r.* 15.

In an action for damages for personal injury the writ was issued on January 9, 1946, and an appearance thereto was entered on January, 22, 1946. No statement of claim was delivered and the defendant served a notice of motion dated October 14, 1954, for hearing on October 22, to dismiss the action for want of prosecution, the plaintiffs not having delivered a statement of claim within the time limited by Order 20, rule 1. At about 10-50 a.m. on October 22 the plaintiffs delivered a statement of claim. The motion was adjourned until November 12, 1954, when the defendant sought and was given leave to amend his notice to bring it within Order 64, rule 15, by adding the words " alternatively there being no proceeding " had for two years from the last proceeding had ".

At an adjourned hearing on November 19 it was contended by the plaintiffs that the order made on November 12 was not retrospective and that in consequence the defendant could not rely on Order 64, rule 15.

Held, that the order of November 12 giving leave to amend was retrospective and that the application to dismiss the action should be granted.

MOTION to dismiss an action for want of prosecution.

The facts are sufficiently stated in the judgment of the Lord Chief Justice.

Gibson for the plaintiffs. The defendant's original application to dismiss the action was based on Order 27, rule 1. This failed because a statement of claim was delivered before the hearing of the motion (2). Although an order was made on November 12, 1954, amending the defendant's notice of motion, he still fails to bring himself within Order 64, rule 15. The order does not relate back: Order 52, rule 11. Amendment therefore did not take effect until November 12, 1954.

(1) In the Queen's Bench Division before Lord MacDermott L.C.J.: November 19, 1954.

(2) [It had been conceded at the hearing on November 12 that on the authority of *Ernest Lyon Ltd. v. Sturges* [1918] 1 K.B. 326 the defendant could not rely on Order 27, rule 1, to dismiss the action, as a statement of claim had been delivered before the hearing on October 22.—REPORTER]

Only from that date is the notice in a different form. It would be necessary to antedate order to enable the defendant to succeed on his amended notice of motion.

[Lord MacDermott L.C.J. : I am not sure that that would be any good.]

There is one case where the order was antedated : *In re Keystone Knitting Mills' Trade Mark* (1).

Brown for the defendant. The plaintiffs' contention is that amendment is completely nugatory. They argue in effect that no such amendment can ever be made. *Reductio ad absurdum* of Order 27, rule 1 and Order 64, rule 15 if this is so. There are two cases where amendments were made but there was no reference to amendments relating back : *In re King & Co.'s Trade Mark* (2) ; *Sayers v. Quinn* (3).

[Lord MacDermott L.C.J. : How do you deal with Order 52, rule 11 ?]

In the notice of motion the words " the plaintiffs not " having delivered a statement of claim within the " time limited by Order 20, rule 1 of the Rules of the " Supreme Court Northern Ireland " are not necessary and are really superfluous.

[Lord MacDermott L.C.J. : But you go and give particulars and confine the matter.]

Gibson in reply :

I submit that the question of when the order was to come into effect was not adverted to. It was assumed by the defendant that the order amending the notice of motion would deal with the situation as at the date of the notice of motion, but the defendant did not ask for that. I submit that the defendant's application to dismiss the action was based on an error of law. If the application had been wide enough to cover Order 64, rule 15 then the statement of claim could not have been delivered. [He referred to *Sayers v. Quinn* (3).]

Lord MacDermott L.C.J. : This application, which raises an interesting point, is for the dismissal of an action for want of prosecution. On May 20, 1945, the

(1) [1929] 1 Ch. 92.
(2) [1892] 2 Ch. 462.
(3) (1889) 23 I.L.T.R. 79.

plaintiffs allege that they were both injured and that a motor car owned by the first named plaintiff was damaged in a road accident caused by the negligence of the defendant. A writ of summons was issued on January, 9, 1946, and an appearance thereto was entered on January 22, 1946. Since then there has been a change of solicitors by both parties and the plaintiffs' present solicitors were first consulted on June 19, 1953. They did not take any immediate steps to proceed with the action but the time in between has been spent in consultations and negotiations.

If this application only depended on events since that date, I should not be inclined to shut the plaintiffs out. But I have to bear in mind that long before that, since January 1946, over 8 years ago, nothing at all had been done. I cannot find in the affidavits any real or satisfactory explanation of this period of delay. I must take that into account. It would be a hardship to the defendant if he had now to meet a case that could have been tried years ago.

I come now to the point raised by Mr. Gibson. What happened was this. The notice of motion was dated October 14, 1954, for hearing on October 22, 1954. At about 10-50 a.m. on October 22 the plaintiffs, who had previously on August 6, 1954, served notice of intention to proceed, delivered a statement of claim. Having read the statement of claim and the items of special damage it contains I can only say that I am astonished that it should have taken so many months to deliver. But this step completely changed the situation. Mr. Brown could not then say that no proceeding had been taken. The notice of motion runs as follows:

"... that on Friday, the 22nd day of October, "1954 ... Counsel on behalf of the Defendant will "apply ... for an Order that his Action may be "dismissed with costs to be taxed and paid to the "Defendant by the Plaintiffs for want of prosecution, "the Plaintiffs not having delivered a Statement of "Claim within the time limited by Order 20 Rule 1 "of the Rules of the Supreme Court Northern Ireland

" or for such other Order as to this Honourable Court " may seem meet ".

Mr. Brown now says that the words " the Plaintiffs " not having delivered a Statement of Claim within the " time limited by Order 20, rule 1 of the Rules of the " Supreme Court Northern Ireland " are otiose, but I cannot disregard them. Their effect is to narrow the basis of the application.

This application came before me on November 12, 1954. Mr. Brown applied to amend the notice of motion in order to enlarge the scope of his application and bring it within Order 64, rule 15, which provides :

" . . . In any cause or matter in which there has " been no proceeding for two years from the last " proceeding had, the defendant may apply to the " Court or Judge to dismiss the same for want of " prosecution, and on the hearing of such application " the Court or Judge may order the cause or matter " to be dismissed accordingly or may make such " order and on such terms as to the Court or Judge " may seem just. . . "

Mr. Gibson opposed the amendment. I made an Order " . . . that the . . . Notice of Motion be amended " by inserting the words ' or, alternatively, there " ' having been no proceeding for more than two years " ' from the last proceeding had ' after the words " ' Supreme Court Northern Ireland '. . . . "

If the notice of motion had been served as amended on October 14, 1954, no question could have arisen, for at that date there had been no proceeding for at least two years. The crucial time in an application under Order 64, rule 15 is the date of the application. The motion then stood adjourned for further evidence. Mr. Brown has now produced an affidavit to show that there had been no proceeding for over two years before the delivery of the statement of claim.

Mr. Gibson relies on Order 52, rule 11, which provides as follows :

" Every order, when drawn up, shall be dated the " day of the week, month and year, on which the " same was made, unless the Court or a Judge shall

"otherwise direct, and shall take effect accord-
"ingly."

It is true that I gave no express direction as to when the order for amendment should take effect, but when one looks at the terms of the order it is clear that it was intended to relate back to the date of the notice of motion. The whole object of the amendment was to give the defendant an opportunity of relying on Order 64, rule 15, and it must therefore, in my opinion, be taken as having a retrospective operation. That being so, it is open to me to make an order under Order 64, rule 15.

On the merits it seems to me that such an order should be made. The sooner accident cases of this sort are brought to trial the better. A long delay means a greater difficulty in finding out what really happened. Memories become blurred and reliable evidence may be hard to obtain. I see no good reason for the eight years delay in this case and I think the defendant was justified in taking the course he did.

The application will be granted with costs.

Order accordingly.

Solicitors for the plaintiffs : *Macaulay & Ritchie.*

Solicitors for the defendant : *C. & H. Jefferson.*

[Reported by J. A. L. McLean, Esq., Barrister-at-Law.]

BROWN v. BELFAST CORPORATION (1).

Practice—Pleading—Particulars—Claim under Lord Campbell's Act—Amount of contributions by persons other than the deceased—Relevancy—Fatal Accidents Act, 1846 (9 & 10 *Vict., c.* 93) *s.* 4.

In an action for damages under the Fatal Accidents Acts the plaintiff in his particulars pursuant to statute alleged that the dependant (deceased's mother) was "mainly dependent on the "deceased". The defendants asked for particulars of the amounts contributed to the house by all parties other than the deceased and for particulars of the relationship, age, employment and earnings of the plaintiff. The plaintiff replied that he was father of the deceased but refused to give any of the other particulars sought.

On a motion for further particulars of the matters which the plaintiff had refused to give, the defendants stated that they proposed to admit liability and that they required the information sought to enable them to assess the extent of the damages properly payable under the Fatal Accidents Acts in order to enable them to make a payment into court.

Held, that the defendants were not entitled to the particulars sought.

MOTION for an order for further and better particulars.

An action was brought by the plaintiff as administrator of Frank Charles Brown claiming damages under the Fatal Accidents Acts and Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, against the defendants for causing the death of Frank Charles Brown by their servant, who negligently drove a Corporation omnibus against him.

The particulars pursuant to statute furnished in the statement of claim were as follows:

"Particulars of person on whose behalf the action "is brought—1. Lilian Margaret Brown, mother of "the deceased, aged 43 years—Nature of the claim "in respect of which damages are sought—The "deceased at the time of his death was 21 years of "age and was in good health. He was employed by "Robbs Limited as a painter, and the said Lilian "Margaret Brown was mainly dependent on the

(1) In the Queen's Bench Division before Lord MacDermott L.C.J.: November 12, 1954.

" deceased and by his death has suffered a loss of said " dependency."

In a notice for further and better particulars the defendants asked (inter alia) for the following particulars :

" 4. Of the weekly or other amounts which the " deceased contributed to the household of his " mother during each of the two years preceding his " death.

" 6. Of the names and relationships and ages of " all persons resident with the mother during the " said period of two years.

" 7. Of the earnings of the mother during the said " period of two years.

" 8. Of the several amounts contributed to the " household of the mother by all persons other than " the deceased during the said period of two years " with relevant names and details.

" 9. Of the relationship, age, employment and earnings of the plaintiff."

To these questions the plaintiff replied as follows :

" 4. £4 per week during the twelve months pre- " ceding his death.

" 6. The plaintiff, father of the deceased, and the " deceased's two sisters.

" 7. Nil.

" 8. Not entitled and not relative (*sic*).

" 9. Father of the deceased. Other information " asked for is not relevant to these proceedings, and " the defendant is not entitled to it."

The defendants then moved for an order for further and better particulars of the matters referred to in questions 8 and 9 above of which the plaintiff refused to give particulars. In the affidavit supporting the motion it was averred that the defendants proposed to admit liability and sought the particulars to enable them to assess the extent of the damages properly payable under the Fatal Accidents Acts.

Gibson for the defendants. Under section 4 of the Fatal Accidents Act, 1846, the plaintiff is required to deliver full particulars of the " nature of the claim in

" respect of which damages shall be sought to be " recovered." The " nature of the claim " is the dependency. Where a dependant is solely dependent on the deceased it is sufficient to say what the deceased contributed. But where the dependant is receiving contributions from others, the defendant is entitled to know the extent of the contribution of those others. The defendants wish to make a lodgment but the plaintiff has not given sufficient particulars to enable them to ascertain the dependency.

McGonigal for the plaintiff. The plaintiff is prepared to state that £4 per week was paid direct to the mother. What she received from other members of the family is irrelevant. *Shiels v. Cruickshank* (1) bears on this point. [He also referred to the definition of " dependant " in Stroud's Judicial Dictionary, 2nd ed. and to *Simmons v. White Brothers* (2).]

LORD MACDERMOTT L.C.J. having stated the facts, considered the questions in the defendants' notice for particulars and the answers thereto and continued: The defendants now seek further and better particulars of (1) the several amounts contributed to the household of the mother by all persons other than the deceased during the period of two years preceding the death of the deceased with relevant names and details and (2) the age, employment and earnings of the plaintiff.

Under section 4 of the Fatal Accidents Act, 1846, the plaintiff is under an obligation to give " a full " particular . . . of the nature of the claim in respect of " which damages shall be sought to be recovered." Has he done that? One must draw the line somewhere. Has the plaintiff complied with the terms of the statute in a reasonable fashion? I think he has. It is said that the particulars now sought are relevant. It may be so in the sense that they may help to measure more exactly the money value of the claim. But I do not think relevancy alone is the test here. This is a

(1) [1953] 1 All E.R. 874. (2) [1899] 1 Q.B. 1005.

question of pleading and not of evidence. One may surely state the nature of a claim fully without giving details of the evidence by reference to which its value will fall to be fixed. It seems to me, as I said before, that one must draw the line somewhere and, if I granted this application, I could not resist an application for a whole series of further particulars aimed at the same purpose and calling for a detailed scrutiny of the habits and affairs of each member of this family group. I do not think the Fatal Accidents Acts intended to authorise that sort of thing.

I refuse this application. If this case goes to the Court of Appeal and it decides otherwise, we shall know better where we are. It seems to me that, liability being admitted, the sooner we get the witnesses here and decide the issue in the constitutional way the better.

Motion refused.

Solicitors for the plaintiff : *Joseph Donnelly & Co.*

Solicitor for the defendants : *Samuel Love.*

[Reported by J. A. L. McLean, Esq., Barrister-at-Law.]

MINISTER OF AGRICULTURE v. McGEOUGH (No. 2) (1).

Emergency legislation—Importation of livestock—Regulations—Validity—Notice of seizure—Agriculture (Miscellaneous War Provisions) Act, 1940 (3 & 4 *Geo.* 6, *c.* 14), *s.* 28—*Livestock (Import from Eire and the Isle of Man) Regulations*, 1945 (*S.R. & O.* 1945, *No.* 942), *regs.* 2, 5.

Section 28 (3) of the Agriculture (Miscellaneous War Provisions) Act, 1940, empowers the Minister of Food by regulations to "determine the times and places at which live stock . . . may be imported or brought into the United Kingdom from Eire and the Isle of Man" and to "make provision as to the routes to be followed by livestock so imported or brought." Regulation 2 of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, made under the Act of 1940, prohibited the importation or bringing of livestock into the United Kingdom except by one of the land routes prescribed in the First Schedule to the Regulations, which prescribed routes were designated as routes from a place in the Republic of Ireland to a place in Northern Ireland by way of a specified customs post in Northern Ireland. The validity of the regulations having been contested on the grounds (i) that the power to make regulations as to the route to be followed by livestock was restricted to regulating the movement of livestock after importation; (ii) that the regulation purported to prescribe routes to be followed outside the United Kingdom, it was *held* that the regulation was intra vires.

An authorised officer who had seized animals at 8-30 p.m. on June 23, 1954, prepared a notice of seizure that night and bearing that date but did not display it at the nearest police barracks until the following morning. The notice stated that "any person claiming that the livestock were at the time of seizure his property and that they were not imported or brought into the United Kingdom from Eire or the Isle of Man or that they were not so imported or brought in or moved in contravention of the said Regulations may within 21 days after the date of this notice give notice in writing to me" at the police barracks, and the notice was signed by the seizing officer. The notice did not specify the time of seizure, nor the time at which the notice was first displayed, but the notice was duly displayed during the prescribed hours for 21 days. The defendant delivered a notice of claim to the livestock addressed to the seizing officer at the barracks on July, 12, 1954.

Held, (i) that it was not necessary to specify in the notice either the time at which the seizure was made or the time when the notice was first displayed.

(1) In the Queen's Bench Division before Sheil and Curran JJ.: Feb. 15, March 7, 1955.

(ii) that the notice was not invalidated by reason of the fact that it stated that any claim should be made to the seizing officer and not to any authorised officer at the barracks.

(iii) that although regulation 5 of the Regulations referred to livestock "dealt with" in contravention of the Regulations, while the notice referred to livestock "moved" in contravention thereof, the notice conformed to the Regulations, being in the form specified in the Second Schedule to the Regulations.

(iv) that since the defendant was not in fact prejudiced by the fact that the notice purported to allow 21 days from the date of seizure, instead of from the date of first display of the notice, for the making of a claim, the error in the notice was not material.

CASE STATED by the Resident Magistrate sitting at Forkhill Petty Sessions.

A sergeant of the Royal Ulster Constabulary, being an authorised officer for the purpose of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, seized 98 sheep which he suspected had been imported in contravention of the Regulations. After seizure the sheep were sold as provided for in the Regulations. The defendant duly delivered a notice claiming the sheep, and the Minister of Agriculture accordingly applied to petty sessions for an order for the forfeiture of the proceeds of sale.

At the hearing of the summons the following facts were admitted or proved:

(i) the sheep were seized at 8-30 p.m. on June 23, 1954.

(ii) the sergeant prepared a notice of seizure that night dated June 23, 1954, but did not display the notice until the following morning.

(iii) the notice, after referring to the seizure of the sheep, continued as follows: "Any person "claiming that the livestock were at the time "of seizure his property and that they were not "imported or brought into the United Kingdom "from Eire or the Isle of Man or that they were "not so imported or brought in or moved in "contravention of the said Regulations may "within 21 days after the date of this notice "give notice in writing to me at R.U.C. bar- "racks, Forkhill, Co. Armagh . . . that he makes

"such claim." The notice was signed by the sergeant.

(iv) the defendant claimed the animals by notice of claim dated July 12, 1954, and addressed to the sergeant at the barracks.

(v) the defendant was not present at the time of the seizure and no notice was given to him of either the time of the seizure or the time of the first display of the seizure notice.

It was contended on behalf of the defendant that the Regulations were ultra vires, in that they purported to prescribe the routes to be followed by livestock before they were imported, while the Act empowered only the making of regulations as to imported livestock, and that the seizure notice was defective and not in conformity with the Regulations, and that accordingly there was no jurisdiction to make a forfeiture order. The resident magistrate rejected these submissions and made a forfeiture order, but stated this case for the opinion of the High Court as to whether he was correct in so holding.

O'Donnell for the defendant.

Nicholson Q.C. and *Lowry* for the Minister.

Cur. adv. vult.

SHEIL J.: The jurisdiction of the resident magistrate in this case has been challenged on two grounds. It is said that the regulation 2 of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, is ultra vires, and that, for various reasons, the notice required by regulation 5 (3) of the same Regulations was invalid.

As to the first point, the proposition was this. Section 28 (3) of the Agriculture (Miscellaneous War Provisions) Act, 1940, empowered the Minister of Food by regulations, (*a*) to determine the times and places, and (*b*) make provisions as to the routes to be followed by imported livestock. It was argued that regulation

2 exceeded the powers given by the Statute, in that section 28 (3) (*b*) must be taken to refer to animals already imported, whereas the regulation purported to deal with livestock not already imported, and indeed it was suggested that the regulation might be taken to apply to an area or territory in the Republic of Ireland, and for that reason also was ultra vires. I do not think that the phrase " so imported " in the sub-section must necessarily refer to livestock already imported. The reasonable construction of sub-section (3) is that the Minister can say livestock are to be imported at certain times and places and are to approach such places by certain known roads, and the land route, e.g. Dundalk-Newry, indicates that part of an approach road which in Northern Ireland between Dundalk and Newry leads to Killeen. If the court were to hold that the sub-section applied only to livestock already imported, it would hold that after livestock had been inspected, marked and passed, and only then, the land route regulations could be met, with the result that an importer having a farm between Killeen and Newry in the example given could not bring his lawfully imported livestock to his farm without first bringing them to Newry.

The notice required by regulation 5 (3) was assailed on several grounds. One was that it should have contained a statement as to the time of seizure, another that it required claimant to give notice of claim to Sergeant Johnston and not to " an authorised officer ", and a third point was that the words " moved " in the seizure notice was restrictive of the words " dealt with " in regulation 5. As to the first point, neither Statute nor Regulations require such a statement. As to the second, the sergeant was an authorised officer on whom service could be and was had by giving notice in writing at Forkhill Barracks, and as to the last point the notice complied with the form in the Second Schedule, and in fact the defendant in his notice of claim denied that the livestock had been dealt with in contravention of the Regulations.

It was further contended that the seizure notice was irregular and defective in that when it was not displayed

until June 24, 1954 it allowed only 21 days from its date (June 23, 1954) for the purpose of making a claim and that the claimant could have been prejudiced by the loss of one day, though Mr. O'Donnell frankly stated that the claimant was not prejudiced by any of the alleged defects in the notice. Indeed, that this is so appears from the notice of claim. The notice was displayed was required by the Regulations and there is no suggestion that it was not displayed for the requisite period.

In these circumstances, I cannot see that an error in a date vitiated the entire notice. If it did, of course the whole notice was invalid and as a notice is a condition precedent to forfeiture the resident magistrate would not have had jurisdiction. But where no prejudice was caused, I am unable to see that the error as to date was any more fundamental than an error in spelling. The resident magistrate was correct in his findings.

CURRAN J.: By Section 28 (3) of the Agriculture (Miscellaneous War Provisions) Act, 1940, it is provided that the Minister of Food may by regulations—

(*a*) determine the times and places at which livestock or any class or description thereof may be imported or brought into the United Kingdom from Eire or the Isle of Man;

(*b*) make provision as to the routes to be followed by livestock so imported or brought or any class or description thereof, and as to their detention for inspection.

The Minister of Food duly made regulations in exercise of the powers so conferred upon him. These regulations are contained in the Livestock (Import from Eire and the Isle of Man) Regulations, 1945. Regulation 2 prohibits inter alia the importation or bringing into the United Kingdom from Eire any livestock except by one of the land routes named in the First Schedule to the said regulations. One of the routes prescribed in the said Schedule is set out as

follows and is here given as an example :

Route.	*Place.*	*Hours of Importation.*
Dundalk—Newry	Killeen	1—2 p.m.

The appellant contends that regulation 2 is ultra vires as it purports to prescribe routes, parts of which are in the Republic of Ireland, whereas section 28 (3) of the 1940 Act only empowers the Minister of Food to prescribe routes in the United Kingdom to be followed by livestock *after* they have been imported or brought into the United Kingdom. This contention in my view is not well founded. What regulation 2 does is to prescribe a route by reference to two points one of which is in the Republic of Ireland and the other in Northern Ireland. The route crosses the border and it is from the point that it so crosses that the regulation is effective. It is from that point to the prescribed place in Northern Ireland that the livestock must follow the appropriate route.

Regulation 5 (3) requires an authorised officer who has seized livestock suspected of being wrongfully imported or brought into Northern Ireland, as soon as practicable to display a notice at the police barracks nearest to the place of seizure, the notice to be in the form set out in the Second Schedule to the Regulations or to the like effect, so as to be visible to the public and to keep it so displayed between the hours of 10 a.m. and 4 p.m. each day for a period of twenty one days The appellant contends that the notice in the present case was dated June 23, 1954, and only allowed twenty one days from that date for claiming the seized livestock, whereas the said notice was not displayed until June 24, 1954, and twenty one days should have been allowed from June 24, and not from June 23. In fact the apellant made his claim in time and admits that he was not prejudiced. The livestock having been seized at 8-30 p.m. on June 23, 1954, the earliest time and date the notice could be displayed in compliance with the said regulation was 10 a.m. on June 24, 1954. The notice was in fact displayed as from that time and remained displayed for the requisite twenty one days The notice in my view was wrong in that it stated that a person had twenty one days from June 23, 1954, in

which to claim. The notice could not, however, prescribe the period, that is prescribed by the Regulations. What the notice did was to give wrong information which in no way prejudiced the appellant. I cannot find, however, that the notice in any way failed to comply with regulation 5 (3). It was in the form prescribed, and, as we have seen, the other requisites were complied with. The other contentions made on behalf of the appellant, in my view, have no substance.

I agree that the resident magistrate was right in his conclusions of law.

Appeal dismissed.

Solicitor for the defendant : *P. Gerard Curran.*

Solicitor for the Minister : *Chief Crown Solicitor.*

J.P.

MINISTER OF AGRICULTURE v. MARMION (1).

Criminal law—Wilfully obstructing an officer in the exercise of his powers—Assault failing to obstruct in fact—Livestock (Import from Eire and the Isle of Man) Regulations, 1945 (*S.R. & O.* 1945, *No.* 942), *reg.* 7 (2) (*i*).

The owner of livestock which were in process of being seized under the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, struck the officer under whose supervision the seizure was being carried out, but the seizure continued unabated and unaffected by the assault. *Held*, by a Divisional Court of the Queen's Bench Division (Lord MacDermott L.C.J. and Black L.J., Sheil J. dissenting) that the assault amounted to an obstruction of the officer in the exercise of the powers conferred upon him. Per Sheil J. It is a question of degree and the circumstances whether an act calculated to obstruct amounts to a wilful obstruction, and the finding at petty sessions in this case that there was no wilful obstruction was not unreasonable and should not be disturbed.

CASE STATED by the Resident Magistrate sitting at Banbridge Petty Sessions.

The respondent was summoned to answer a complaint that he had wilfully obstructed Sergeant Samuel Arlow within the meaning of regulation 7 (2) of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945 (2).

At the hearing of the summons the following facts were admitted or proved:

(i) On April 27, 1953, Sergeant Arlow of the Livestock unit of the R.U.C. went in plain clothes to a sale of pigs in Banbridge, accompanied by three constables. The respondent had a small lorry containing 18 pigs in the yard where the sale was being conducted.

The sergeant suspected that the pigs had been unlawfully imported and declaring his identity, he

(1) In the Queen's Bench Division before Lord MacDermott L.C.J., Black L.J. and Sheil J.: Feb. 10, Mar. 7, 1955.

(2) By the Livestock (Import from Eire and the Isle of Man) Regulations, 1945:
Regulation 7:
"(2) If any person—
"(i) wilfully obstructs or impedes any person in the exercise of any powers conferred on him by or under these Regulations . . . he shall be guilty of an offence and liable on summary conviction to a fine not exceeding £50".

asked the respondent for information about the pigs. The respondent made a statement and the sergeant told him he would make known his decision as to the seizure of the pigs in five minutes time. Having decided to seize them he looked for the respondent but could not see him, and after waiting for a time he ordered the three constables and two yardsmen to remove the pigs from the lorry.

(ii) As the removal of the pigs proceeded the sergeant took no further physical part in the seizure but remained standing near the lorry.

(iii) A crowd gathered around the lorry.

(iv) When approximately six pigs had been removed from the lorry the respondent returned to the market yard.

(v) The respondent rushed through the crowd and twice struck the sergeant upon the chest with his fist and said : " Who the hell gave these men authority to interfere with my pigs ? "

(vi) A uniformed policeman came through the crowd and spoke to the respondent who did not say or do anything thereafter.

(vii) The seizure of the pigs proceeded unabated or unaffected by the respondent's action which occupied an exceedingly short space of time. The respondent did not in any way interfere with the men who consequent upon the sergeant's earlier orders were engaged in the removal of the pigs.

It was contended for the respondent that while the evidence for the prosecution—if it remained unchallenged—established an assault, it failed to establish an obstruction.

The resident magistrate found as a fact that, although assaulted, the sergeant had not been obstructed and he dismissed the summons on the merits. On the application of the Minister he stated this case for the opinion of the High Court asking whether he was right in law (*a*) in so holding, and (*b*) in dismissing the summons.

Lowry for the Minister.

Stewart Q.C. and *McDevitt* for the respondent.

Cur. adv. vult.

LORD MACDERMOTT L.C.J. stated the facts and continued: In the course of the argument before us counsel for the respondent submitted that on the evidence it was open to the resident magistrate to come to the conclusion that the respondent did not intend to obstruct Sergeant Arlow, and that the dismissal of the summons had enough to sustain it as a decision on the facts and ought not to be disturbed.

As at present advised, I am inclined to think that an intention to obstruct is not an essential ingredient of the present charge and that it is enough to prove the deliberate doing of something which by its nature is calculated to obstruct. I doubt, for example, if it would avail a person guilty of conduct which was inherently likely to obstruct to prove that what he did was done in a fit of temper and without any intention of impeding or hindering the exercise of the powers in question. I need not, however, say more on this particular subject as I am satisfied from the terms of the case stated that the resident magistrate did not reach his decision on any ground respecting the respondent's state of mind. There is no finding as to the respondent's intentions or motives, and in view of the facts and circumstances of the assault it is most unlikely that a conclusion would have been reached upon considerations of this nature without the respondent being given an opportunity of being heard. Though the basis of the determination is not stated in the case as clearly as it might be, I think there can be no real doubt as to what it was. The resident magistrate obviously held as he did because he was satisfied that the respondent had not in any way actually hindered or interfered with the carrying out of the seizure. In short, he held the respondent could not be guilty of obstructing because in fact he had not caused an actual obstruction. This accepts the respondent's contention, as recorded in the case, and it also explains the materiality of finding (vii), which is in these terms:

"(vii) The seizure of the pigs proceeded unaffected
" or unabated by respondent's action which occupied
" an exceedingly short space of time.

"The respondent did not in any way interfere "with the men who consequent upon the Sergeant's "earlier orders were engaged in the removal of the "pigs".

The question for determination, therefore, is whether in point of law the offence of wilfully obstructing as here charged is committed if what is done does not hinder or otherwise prejudicially affect the due exercise of the relevant powers. Now, the proposition accepted by the resident magistrate is a plausible one, for at first sight it seems logical enough to say that conduct which amounts to a wilful obstruction implies that someone has been actually obstructed. None the less I do not think that view is sound. So to hold would make conviction depend not on the fact that the accused's actions were calculated to obstruct, or even on proof of an intention to obstruct, but on the acts complained of being, in addition, successful in the sense of having caused the consequences which were likely or intended to flow from them. I do not think this can have been the intention of the Regulations. And in construing the words of regulation 7 (2) it must also be remembered that the courts have long recognised that the words "obstruct" and "obstruc-"tion" do not necessarily connote an actual or effective obstruction. Thus, in *Reg. v. Bradford* (1) it was held by the Court for Crown Cases Reserved (Cockburn C. J., Martin B., Crompton and Willes JJ. and Bramwell B.) that the offence, under section 15 of the Railway Regulation Act, 1840, of wilfully doing "anything in such manner as to obstruct any engine "or carriage using any railway" was committed even though no actual obstruction occurred. In that case the defendants had placed a railway truck across a railway line but the truck had been removed before any collision took place. The judgment of the court was delivered by Cockburn C.J., who said (2): "It "was contended by the counsel for the prisoner that "there can be no obstruction until some train be

(1) (1860) 8 Cox C. C. 309. (2) Ibid. 313.

" actually obstructed ; but such a construction cannot " be maintained. The object of the Legislature was " obviously to prevent any disaster to those using the " railway, and to punish those who put obstructions in " such manner as was likely to cause such disaster." Though the highway obstruction cases are not altogether in pari materia, they also serve to show the import of the words in question. In *Reg. v. Fermanagh Justices* (1) it was held by the Irish Queen's Bench Division (Lawson and Johnson JJ.) that the placing of things on a public street in a manner calculated to create an obstruction to free passage was an offence under section 13 of the Summary Jurisdiction (Ireland) Act, 1851, though no person or carriage was proved to have been actually obstructed thereby. Section 13 enacted that " any person who shall in any manner, " wilfully, or by negligence or misbehaviour, prevent " or interrupt the free passage of any person or carriage " on any public road, or street, or crossing shall be " liable to a fine . . . ." It was contended that the offence was not made out in the absence of evidence showing an actual obstruction, but the court refused to take this view of the matter, Lawson J. saying (2) : " I am not disposed to give the section . . . the narrow " construction contended for by Mr. Colquhoun, that " the meaning of it is that some person or carriage must " have been seen by the person making the complaint " to have been actually obstructed. In my opinion, if " things were placed there in such a way as to create " an obstruction, it is quite sufficient to satisfy the " requirements of the section." Again, in *Gill v. Carson and Nield* (3), the King's Bench Division in England (Lord Reading C.J., Avory and Shearman JJ.) held that it was not necessary to constitute an offence of wilful obstruction under section 28 of the Town Police Clauses Act, 1847, that any person should be actually obstructed. That section provided that " every person who . . . by means of any cart, carriage . . . or other other means . . . wilfully causes any obstruc-

(1) (1883) 14 L.R. Ir. 50.
(2) Ibid. 53.
(3) [1917] 2 K.B. 674.

" tion in any . . . public thoroughfare " shall be liable to a penalty. The defendants had left two horse-drawn vehicles standing unattended for five minutes in a wide main road with tramlines laid down the centre. Any vehicle proceeding in the direction in which the appellants' vehicles were in the course of travelling would have had to draw on to the tramlines and so might obstruct a tram using those lines until the appellants' vehicles had been passed. The justices had convicted though there was no evidence of any actual obstruction having occurred. The Divisional Court allowed the appeal on the facts, holding that an obstruction of the kind charged was only caused if there was an unreasonable user of the highway. But the argument for the appellants that there could not be a conviction in the absence of evidence of an actual obstruction did not find favour with the court. On that point Lord Reading said (1): " In my judgment " it is not necessary to prove that a person has been " actually obstructed. It is quite sufficient to prove " circumstances from which the Justices can conclude " that in the ordinary course persons may be ob- " structed, and that the actual use of the road was " calculated to obstruct even though no person was " proved to have been obstructed."

For these reasons, I consider that the resident magistrate was wrong in holding as he did and I would, accordingly, answer both the questions submitted at (*a*) and (*b*) in the negative, being of opinion (i) that the offence charged does not necessarily connote any actual hindering or impeding of the person alleged to be obstructed in the exercise of the powers conferred by the Regulations, and (ii) that the facts and findings set forth were sufficient to raise a prima facie case against the respondent. The matter must, therefore, be remitted with a direction to proceed according to law.

BLACK L.J. stated the facts and continued: At the hearing the defendant's solicitor submitted that

(1) Ibid. 677.

while the evidence for the prosecution (if it remained unchallenged) established an assault yet it failed to establish the charge laid which was a charge of obstruction. He contended that the evidence established that the sergeant had not in any way been obstructed. The learned resident magistrate accepted this view and purported to find as a fact that although assaulted, the sergeant had not been obstructed.

It is obvious from the case stated that the contention of the defendant's solicitor and the finding of the resident magistrate were based upon the facts set out in paragraph (vii) of the case. That paragraph sets out that the seizure of the pigs proceeded unaffected or unabated by the defendant's action which occupied an exceedingly short space of time and that the defendant did not in any way interfere with the men who consequent upon the sergeant's earlier orders, were engaged in the removal of the pigs.

I cannot accept the view urged by the defendant's solicitor and adopted by the resident magistrate. It appears from the case stated that immediately after the assault a uniformed policeman came through the crowd and spoke to the defendant who did not do or say anything thereafter. The constables and the yardmen who were actually engaged in the removal of the pigs had not to interrupt their task. The charge, however, before the court was not one of obstructing the constables and the yardmen. It was a charge of wilfully obstructing the sergeant in the exercise of the powers conferred upon him by the Regulations. Once he had proceeded as an "authorised officer" upon the seizure of the pigs Sergeant Arlow had undertaken a considerable responsibility. It was his responsibility to see that the seizure was properly carried out and that the pigs were taken into safe and proper keeping. Although he was taking no actual physical part in the seizure nevertheless the seizure was under his direction and orders and was a matter which demanded his vigilant attention. His particular task at the time of the assault may be described as one of superintendence. In my opinion any deliberate act calculated to interfere with the

vigilant performance by a peace officer of the duty in which he is engaged, constitutes a wilful obstruction of the officer in the execution of his duty. It is well established that actual physical interference with the officer in the course of his duty is not necessary in order to constitute obstruction. In the present case, however, we have the element of actual physical interference. The assault described in the case stated was clearly calculated to distract the sergeant's attention, even if only momentarily, from the task which he had in hand. I think the suggestion that the defendant's conduct in the present case, as set out in the case stated, did not constitute a wilful obstruction of the sergeant in the exercise of the powers conferred on him by the Regulations, would have greatly surprised the members of the court which decided *Duncan v. Jones* (1) or Salter J. who tried the case of *R. v. Hufflett* (2). I accordingly agree that the questions submitted in the case stated should be answered in the negative and that the matter should be remitted to the resident magistrate.

SHEIL J.: My difficulty in this case is caused by having the unhappiness to have to differ from my Lords, but having considered their judgments I still find myself unable to say that the resident magistrate was wrong. It is in my view important always to bear in mind that he heard the witnesses and, further, that he is not without experience in determining petty sessions cases. Having heard and seen the witnesses he found as a fact that although the sergeant was assaulted he had not been obstructed.

Can I in those circumstances hold that this was a quite unreasonable conclusion? It is obvious to my Lords that the resident magistrate was wrong and why he went wrong, viz.: because of the finding (vii) in the case stated. That may indeed be so but I cannot isolate that finding and found a conclusion on it alone. We may not lose sight of the form of the phrase in

(1) [1936] 1 K.B. 218. (2) (1919) 84 J.P. 24.

finding (v) nor of the finding (vi) that when a uniformed policeman spoke to the respondent he desisted from further act or word.

I respectfully agree with my Lords that it may not be necessary to show an intention to obstruct. If it were so necessary I would fail to find such intention on all the facts of this case. It may well be that proof of actual obstruction is not necessary, though if such can be proved or, as in *Duncan v. Jones* (1), be admitted, that of course would conclude the case, but if we reach the stage (and I do not dissent from the view) that something calculated to obstruct is sufficient to constitute the offence of wilful obstruction then, with great respect, I say that the question becomes one of degree or of circumstances and that the primary tribunal is the best judge of both. In this connection I would refer to section 38 of the Offences against the Person Act, 1861, which draws a distinction between (*a*) assaulting, (*b*) resisting and (*c*) obstructing a peace officer in the due execution of his duty. One can assault a peace officer in the due execution of his duty and yet not obstruct him in such execution.

It may be—I do not at all say that it is so—but it may be that I should have reached a different conclusion from that arrived at by the resident magistrate, but I am unable to hold that on the facts found only one conclusion—that there had been a wilful obstruction—could be drawn by a reasonable person honestly applying his mind to the question. This is the test laid down by Humphreys J. in *Bracegirdle v. Oxley* (2), and on this test I am of opinion that this court cannot hold that the resident magistrate was wrong in law.

Appeal allowed.

Solicitor for the Minister : *Chief Crown Solicitor.*

Solicitor for the respondents : *J. G. Lennon.*

S.M.M.

(1) [1936] 1 K.B. 218. (2) [1947] K.B. 349, 357.

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" subject to any directions . . . given " him by the appropriate Minister, " seize that livestock and may sell it " at any time after the seizure ". Regulation 5 (4) provides for the bringing of condemnation proceedings at petty sessions by the appropriate Minister for the forfeiture of the livestock seized " or the proceeds of the " sale thereof, as the case may be ". An authorised officer seized bullocks which he suspected had been illegally imported but he did not personally sell them nor did he authorise any person to sell them on his behalf. The bullocks were in fact sold by an auctioneer acting on behalf of the Ministry of Agriculture for Northern Ireland before any condemnation proceedings had been taken. The Minister of Agriculture for Northern Ireland subsequently brought proceedings at petty sessions for the forfeiture of the proceeds of this sale of the bullocks but the resident magistrate refused to make a forfeiture order and dismissed the summons. *Held*, that the words " or the proceed of sale thereof as the " case may be " in regulation 5 (4) referred only to the proceeds of such a sale as was authorised by the Regulations, that is a sale by a seizing officer, and that there was no power to condemn the proceeds of a sale made by any other person. *Minister of Agriculture v. Nugent* .. [Q.B.D. 58

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the time at which the seizure was made or the time when the notice was first displayed. (ii) that the notice was not invalidated by reason of the fact that it stated that any claim should be made to the seizing officer and not to any authorised officer at the barracks. (iii) that although regulation 5 of the Regulations referred to livestock "dealt with" in contravention of the Regulations, while the notice referred to livestock "moved" in contravention thereof, the notice conformed to the Regulations, being in the form specified in the Second Schedule to the Regulations. (iv) that since the defendant was not in fact prejudiced by the fact that the notice purported to allow 21 days from the date of seizure, instead of from the date of first display of the notice, for the making of a claim, the error in the notice was not material. *Minister of Agriculture v. McGeough (No. 2)* .. .. .. [Q.B.D. 217

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HIGH COURT—MEANING—*Whether judge sitting alone competent to hear special case stated—Acquisition of Land (Assessment of Compensation) Act*, 1919, (9 & 10 *Geo.* 5, *c.* 57), *s.* 6. A judge sitting alone is not competent to hear a special case stated on a point of law arising out of proceedings under the Acquisition of Land (Assessment of Compensation) Act, 1919. *Semble*: "High Court" means a court sitting in banc except in cases coming within the scope of section 44 of the Judicature (Ireland) Act, 1877, or where otherwise specially provided by Rule or Statute. *McConnell v. Belfast Corporation* .. .. [Q.B.D. 196

HOUSING—*Sale of subsidy house—"Permitted Price"—Building Materials and Housing Act*, 1945 (9 & 10 *Geo.* 6, *c.* 20), *s.* 7—*Housing (No. 2) Act (Northern Ireland)* 1946 (10 & 11 *Geo.* 6, *c.* 20), *s.* 7—*Housing Act (Northern Ireland)*, 1951 (15 & 16 *Geo.* 6, *c.* 13) *ss.* 2, 5. Section 7 (1) of the Housing (No. 2) Act (Northern Ireland), 1946, included in the covenants to be entered into by a building owner obtaining a subsidy under that Act certain statutory conditions, including the condition that for a specified period the house should not be sold or

transferred for a consideration which exceeded in value the amount by which the " permitted price " exceeded the amount of the subsidy. By section 7 (2) the value of any consideration in excess of the consideration allowed by the statutory condition referred to could be recovered by the purchaser. The " permitted price " was defined by reference to the Building Materials and Housing Act, 1945, in which Act " permitted price " meant the figure stated in the building licence and limiting the price for which the house might be sold. A building licence issued in respect of a subsidy house stated that the " permitted " price " for the purposes of the Building Materials and Housing Act, 1945, was £1770, including £300 in respect of the capitalised value of a ground rent of £15 per annum with which the site was burdened. The completed house was sold for £1520 —being £1770 less the building subsidy of £250—to a purchaser who covenanted to pay the ground rent of £15 per annum and to keep the vendor indemnified in respect of it. The purchaser subsequently sought to recover from the vendor the sum of £300 representing the capitalised value of the ground rent. *Held*, by the Court of Appeal (Lord MacDermott L.C.J., Porter and Black L.JJ), (i) that the relevant legislation contemplated only one " permitted price " which was that fixed by the building licence, and this figure could not vary according to the mode by which the sale was effected or according to the extent of the interest transferred; (ii) that the value of the covenant by the purchaser to pay the ground rent of £15 per annum and to keep the vendor indemnified in respect of it could not be added to the purchase price actually paid in order to calculate the consideration for the purposes of section 7 (2). *Held*, further by Porter L.J. (Lord MacDermott L.C.J. and Black L.J. reserving their opinion on the point) that any rights which the plaintiff might have acquired were abrogated by the operation of sections 2 and 5 of the Housing Act (Northern Ireland), 1951. *Patterson v. Dugan* .. .. .. [C.A. 150

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NEGLIGENCE—*Contribution between tortfeasors—Cause of action against one tortfeasor abandoned by plaintiff—Any tortfeasor " liable . . . or would if sued " have been liable "—Law Reform (Miscellaneous Provisions) Act (Northern Ireland)*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6 *c.* 9), *s.* 16 (1) (*c*). By section 16 (1) (*c*) of the Law Reform (Miscellaneous Provisions) Act, (Northern Ireland), 1937, " any tortfeasor liable . . . may " recover contribution from any other " tortfeasor who is, or would, if sued, " have been, liable in respect of the " same damage . . . " A workman employed by A was travelling to work in A's lorry, which was driven by B, when he was killed in an accident involving another lorry owned by C and driven by D. The plaintiff as administratrix of the deceased sued A, B, C and D, and her writ alleged negligent driving as against each defendant, and as against A further alleged negligence in failure to provide a safe means of transport. At the trial the jury found that B was not negligent in the driving of A's lorry but that D was negligent in the driving of C's lorry. The alleged negligence of A in failing to provide a safe means of transport had not been pursued in

the statement of claim, but at the trial, at the instance of C and D, a question on this point was put to the jury which found that A was guilty of negligence by overloading his lorry. The plaintiff thereupon sought leave to amend her statement of claim to include the issue of overloading. The trial judge refused leave to amend, but he gave judgment against A as to one-third and against C and D as to two-thirds, the judgment against A being on the basis that by reason of the finding on overloading A was liable to make contribution under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, as another tortfeasor "who is, or "would, if sued, have been liable in "respect of the same damage." *Held*, by the Court of Appeal (Lord MacDermott L.C.J., Porter and Black L.JJ.), (i) that the plaintiff was not entitled to judgment against A as the negligence in overloading found against A was not an issue raised in the action between the plaintiff and A; (ii) that C and D had no claim to contribution against A since A had been sued and been held not liable, notwithstanding that in an action with the issue of overloading properly raised he would have been liable. *Wimpey (George) & Co. Ltd. v. British Overseas Airways Corporation* [1955] A.C.169 considered. *Walsh v. Curry and others* [C.A. 112

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NULLITY — *Jurisdiction — Voidable marriage—Woman petitioner resident within the jurisdiction—Respondent resident and domiciled out of the jurisdiction—Marriage celebrated within the jurisdiction—Matrimonial Causes and Marriage Laws (Ireland) Act*, 1870 (33 & 34 *Vict., c.* 110), *ss.* 7, 13—*Matrimonial Causes Act (Northern Ireland)*, 1938 (2 & 3 *Geo.* 6, *c.* 13), *ss.* 11, 28 (1)—*R.S.C. Or.* 70, *r.* 7 (1). In 1943 a ceremony of marriage was celebrated in Northern Ireland between the petitioner who was domiciled and resident in Northern Ireland, and the respondent who was a serving soldier domiciled in England. In 1946 the respondent was demobilised and the parties went to live in England. After a few days they separated and the petitioner returned to Northern Ireland while the respondent continued to live in England. In 1952 the petitioner presented a petition to the High Court in Northern Ireland seeking the annulment of the marriage on the ground of the respondent's impotency, or alternatively on the ground of his wilful refusal to consummate the marriage. This petition was served on the respondent in England. A solicitor in England instructed by the respondent denied the allegations, stated that the case would not be defended if an arrangement could be reached on costs and requested the petitioner's solicitor to suggest solicitors in Northern Ireland who would act for the respondent. In fact no appearance was entered on behalf of the respondent and subsequent correspondence showed that the respondent did not intend to contest the suit but wished to have the marriage terminated. On the suit coming on for hearing as an undefended suit. *Held*, (i) that the residence of the petitioner within the jurisdiction was not of itself sufficient to confer jurisdiction on the court. The jurisdiction of the High Court in Northern Ireland in nullity matters depends on section 7 of the Matrimonial Causes and Marriage Laws (Ireland) Act, 1870, by which the court is to "proceed and act and give relief on "principles and rules which in the "opinion of the said court shall be as "nearly as may be conformable to the "principles and rules upon which the "ecclesiastical courts of Ireland have "heretofore acted and given relief." These courts acted on principles analogous to the Statute of Citations, 1531, although that statute did not apply in Ireland, and the decisions of the civil courts do not support the proposition that these principles have been departed from to the extent of exercising jurisdiction on the basis that the petitioner alone resided within the jurisdiction. *De Reneville v. De Reneville* [1948] P. 100 followed. (ii) that the facts did not warrant the assumption that the respondent had submitted to the jurisdiction of the court. *Semble* that in cases involving status jurisdiction cannot be conferred by the submission of a party to the jurisdiction of the court. (iii) that the provisions of Order 70, r. 7 (1) that a petition in a matrimonial cause or matter may be served out of the

jurisdiction without leave does not confer jurisdiction on the court to deal with a matter not otherwise cognisable. (iv) that in the exercise of the jurisdiction to annul a marriage there is no ground for distinguishing between a void marriage and a voidable marriage, and as the courts of England and Ireland have long exercised jurisdiction to annul void marriages celebrated within the jurisdiction irrespective of the domicile or residence of the parties, there was power in the court to pronounce a decree of nullity in the present case on the ground that the marriage was celebrated in Northern Ireland. *Inverclyde v. Inverclyde* [1931] P. 29 and *Casey v. Casey* [1949] P. 420 disapproved and not followed. *Semble*, that in the present case the English court, as the court of the respondent's domicile, would have had concurrent jurisdiction. *Addison (otherwise McAllister) v. Addison* [Q.B.D. 1

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PRACTICE—Default in Pleading —*Default in delivery of statement of claim—Application to dismiss for want of prosecution—Delivery before hearing —Amendment of notice of motion—Retrospective effect of order—R.S.C. Or.* 20, *r.* 1—*R.S.C. Or.* 27, *r.* 1—*R.S.C. Or.* 52, *r.* 11—*R.S.C. Or.* 64, *r.* 15. In an action for damages for personal injury the writ was issued on January 9, 1946, and an appearance thereto was entered on January 22, 1946. No statement of claim was delivered and the defendant served a notice of motion dated October 10, 1954, for hearing on October 22, to dismiss the action for want of prosecution, the plaintiffs not having delivered a statement of claim within the time limited by Order 20, rule 1. At about 10-50 a.m. on October 22 the plaintiffs delivered a statement of claim. The motion was adjourned until November 12, 1954, when the defendant sought and was given leave to amend his notice to bring it within Order 64, rule 15, by adding the words "alter-"natively there being no proceeding "had for two years from the last "proceeding had". At an adjourned hearing on November 19 it was contended by the plaintiffs that the order made on November 12 was not retrospective and that in consequence the defendant could not rely on Order 64, rule 15. *Held*, that the order of November 12 giving leave to amend was retrospective and that the application to dismiss the action should be granted. *McAllister v. Wilson* [Q.B.D. 208

——Execution—*Garnishee order—Judgment against personal representative—Money due to estate of deceased—Debt—"owing or accruing"—Money held on deposit receipt—R.S.C. Or.* 45, *r.* 1. A garnishee order may be made to attach money due to the estate of a deceased person in favour of a creditor of the deceased who has obtained judgment against the personal representative as such. Moneys held by a bank upon deposit receipt on terms that specified notice of withdrawal must be given and that the receipt must be produced for discharge at the time of payment is not a debt "owing "or accruing" until such terms have been complied with and is accordingly not attachable by a garnishee order. *C. & E. Lewis Ltd. v. Gribben* [Q.B.D. 51

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deceased—Relevancy—Fatal Accidents Act, 1846 (9 & 10 *Vict., c.* 93) *s.* 4. In an action for damages under the Fatal Accidents Acts the plaintiff in his particulars pursuant to statute alleged that the dependant (deceased's mother) was "mainly dependent on "the deceased". The defendants asked for particulars of the amounts contributed to the house by all parties other than the deceased and for particulars of the relationship, age, employment and earnings of the plaintiff. The plaintiff replied that he was father of the deceased but refused to give any of the other particulars sought. On a motion for further particulars of the matters which the plaintiff had refused to give, the defendants stated that they proposed to admit liability and that they required the information sought to enable them to assess the extent of the damages properly payable under the Fatal Accidents Acts in order to enable them to make a payment into court. *Held*, that the defendants were not entitled to the particulars sought. *Brown v. Belfast Corporation* .. .. [Q.B.D. 213

——THIRD PARTY—*Third party a public authority—Action begun more than twelve months after accident—Whether claim against third party barred—Law Reform (Miscellaneous Provisions) Act (Northern Ireland)*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 9), *s.* 16 (1) (*c*)—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1—*Law Reform (Miscellaneous Provisions) Act (Northern Ireland)*, 1951 (14 & 15 *Geo.* 6, *c.* 7), *s.* 9—*R.S.C. Or.* 16, *r.* 52. The plaintiff's motor car was damaged in a collision involving a motor lorry owned by the first defendant and driven by the second defendant and a bus owned by the Ulster Transport Authority. More than twelve months after the collision the plaintiff began an action against the first and second defendants who thereupon, by leave of the court, joined the Transport Authority and the driver of the bus as third parties, claiming from them an indemnity or contribution under the provisions of section 16 (1) (*c*) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937. Each of the third parties claimed the protection of the Public Authorities Protection Act, 1893. The defendants applied for directions as to the determination of the issues arising between them and the third parties. *Held*, by the Court of Appeal (Porter and Black L.JJ. and Curran J.), that there was an issue between the defendants and the third parties which should be tried at the trial of the action between the plaintiff and the defendants.: *per* Porter L.J. and Curran J. on the ground that the defendants' claim against the third parties was in respect of a statutory right to indemnity or contribution to which the Public Authorities Protection Act, 1893, had no application: *per* Black L.J., who inclined to the contrary view, on the ground that the question of law involved was one of doubt and should therefore be raised in proceedings upon which an appeal could be had to the House of Lords. *Per* Black L.J.: When a doubtful point has been decided in a particular way by the Court of Appeal in England the courts in Northern Ireland should be slow to differ, especially in a case where the decision of the court in Northern Ireland would not be subject to an appeal to the House of Lords. Decision of Lord MacDermott L.C.J. affirmed. *McGuigan v. Pollock* .. .. .. [C.A. 74

PROBATE—PRACTICE—*Testator domiciled in Northern Ireland—Appointment of bank as sole executor—Bank registered as company in Republic of Ireland—Whether bank a trust corporation—Probate and Letters of Administration Act (Northern Ireland)*, 1933 (23 & 24 *Geo.* 5, *c.* 16), *ss.* 1, 4—*Companies Act (Northern Ireland)*, 1932 (22 & 23 *Geo.* 5, *c.* 7), *s.* 335—*Companies Act*, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 380—*Government of Ireland (Companies, Societies, etc.) Order*, 1922 (*S.R. & O.* 1922, *No.* 184), *art* 4. By section 1 of the Probate and Letters of Administration Act, 1933, probate may be granted to a trust corporation, and by section 4 (1) (*b*) a trust corporation is defined as, inter alia, "a "company . . . within the definition "of the Companies Act". The same subsection defines Companies Act by reference to section 335 of the Companies Act (Northern Ireland), 1932, or section 380 of the Companies Act, 1929, and each of these sections defines a company as a company formed and registered under the Act itself or an "existing company". By section 335 of the Northern Ireland Act of 1932 "existing company"

means "a company formed and "registered or deemed to have been "registered in Northern Ireland" under the earlier Companies Acts. By the Government of Ireland (Companies, Societies, etc.) Order, 1922, a company registered at January 1, 1922, in Ireland under the Companies Acts shall, if its registered office is situate in Northern Ireland, be deemed for the purposes of the Companies Acts to be registered in Northern Ireland. By section 380 of the Act of 1929 "existing company" means a company formed and registered under the earlier Companies Acts "but does not include a company "registered under the said enact-"ments in Northern Ireland or the "Irish Free State". The Munster and Leinster Bank, Limited, was incorporated in 1885 under the Companies Act, 1862, and the registered office and head office was at all material times in the City of Cork, though it had branches in Northern Ireland. *Held*, (i) that the Bank was not an "existing "company" within section 335 of the Northern Ireland Act of 1932 because it was not formed and registered in Northern Ireland, nor could it be deemed to be registered in Northern Ireland by virtue of the Order of 1922 since the registered office was not in Northern Ireland; (ii) that the Bank was not an "existing company" within section 380 of the United Kingdom Act of 1929 because it was registered in the Irish Free State; (iii) that accordingly the Bank was not a trust corporation within the meaning of section 4 (1) (*b*) of the Probate and Letters of Administration Act (Northern Ireland), 1933. The provision in section 4 (1) (*a*) of the Act of 1933 that a trust corporation shall also mean "a corporation appointed by the High "Court in any particular case to be a trustee" does not empower the appointment of a corporation not otherwise qualified as a trust corporation unless there is some particular reason on the merits for making such appointment. *In re McKee*
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PUBLIC HEALTH — HOUSING — *Nuisance in dwelling house—Whether dwelling house unfit for human habitation—Unfitness of part of house—Public Health (Ireland) Act*, 1878 (41 & 42 *Vict.*, *c.* 52), *ss.* 110-112—*Planning and Housing Act (Northern Ireland)*, 1931 (21 & 22 *Geo.* 5, *c.* 12), *s.* 30. Section 110 of the Public Health (Ireland) Act, 1878, requires sanitary authorities in certain circumstances to serve on the owners of premises on which a nuisance exists a notice requiring the abatement of the nuisance, and sections 111 and 112 provide for the enforcement of such notices by means of proceedings at petty sessions. Section 30 (1) of the Planning and Housing Act (Northern Ireland), 1931, provides that "where a local authority "... are satisfied that any dwelling-"house is in any respect unfit for "human habitation they shall, unless "they are satisfied that it is not "capable at a reasonable expense of "being rendered so fit, serve upon the "person having control of the house a "notice" requiring the execution of works which the local authority think necessary to render the house fit for habitation, and subsection (3) of that section provides that "notwithstand-"ing anything contained in [section "110 of the Act of 1878] ... the local "authority shall not serve a notice "under that section in any case to "which this section applies". The executive sanitary officer of the L. Corporation, acting on behalf of the Corporation, served the owner of premises with a notice under section 110 of the Act of 1878, and as the notice was not complied with he caused a summons to be served. The owner did not dispute the facts alleged by the sanitary officer but claimed that the house was unfit for human habitation and that the Corporation was precluded from proceeding under the Act of 1878 by reason of the provisions of section 30 (3) of the Act of 1931. *Held*, by the Court of Appeal, (i) that where a local authority brings proceedings for the abatement of a nuisance in a dwelling-house under the provisions of the Act of 1878, without considering or without forming any conclusion as to the applicability of section 30 of the Act of 1931, it is a matter for the court before which the proceedings are brought to determine whether in the circumstances that section applies, i.e., whether the dwelling-house is "in any respect "unfit for human habitation," and if so, whether it is "capable of a reason-"able expense of being rendered so "fit". *Quaere* whether the court can review a determination by a local authority as to the applicability of

section 30. (ii) that in determining whether a house is unfit for human habitation, regard is to be had to whether the house as a whole is so unfit, rather than to whether it is so unfit as respects any part; and it is a question of fact and degree in each case whether the unfitness of a part of a house is such as to render the whole house unfit. *Drayson v. Galbraith* [C.A. 168

ROAD TRANSPORT — *Carrying merchandise for reward—Hire of vehicle accompanied by transfer of services of driver—Driver leaving employment of owner and becoming employed by hirer—Transport Act (Northern Ireland)*, 1948 (12 & 13 *Geo.* 6, *c.* 16), *s.* 18. S. 18 (1) of the Transport Act (Northern Ireland), 1948, prohibits the use by any person other than the Ulster Transport Authority of a motor vehicle on the public highway to carry for reward any passengers or luggage or merchandise except with the consent of the Authority and the approval of the Ministry of Commerce. By the proviso to s. 18 (2) (*b*) where an agreement for the hire of a motor vehicle which is used to carry merchandise on a public highway is accompanied by the transfer to the person hiring the vehicle of the services of a driver thereof, the person by whom the vehicle has been let on hire shall be deemed to carry such merchandise for reward. A. agreed to supply a motor lorry on hire to B. complete with a driver and helper for the sum of £27 per week. This agreement was subsequently modified so as to provide that the driver and the helper should, if they were agreeable, leave the employment of A. and become employed by B., and that the sum payable for the hire of the lorry should thereupon be reduced by the amount of the wages paid to the driver and the helper. The lorry was subsequently used by B. for the carriage of his own merchandise in accordance with these modified terms, and on A. being charged with an offence against s. 18 (1) of the Act it was found as a fact that at the material time the driver and the helper were in the employment of and acting under the control of B. *Held*, that on these facts the agreement between A. and B. was an agreement for the hire of a motor vehicle accompanied by a transfer of the services of a driver thereof within the meaning of the proviso to s. 18 (2) (*b*) of the Act, and that accordingly A. was guilty of an offence under the section. *Ulster Transport Authority v. Wm. E. Ardill, Ltd.* [Q.B.D. 34

SALE OF GOODS—*Breach of warranty—Sum claimed in excess of purchase price—Measure of damages—Sale of Goods Act*, 1893 (56 & 57 *Vict.*, *c.* 71), *ss.* 12 (1), (2), 53 (2). The purchaser of a motor car which was later seized by the Customs authorities as having been illegally imported into Northern Ireland paid the tax and duty which were due in order to regain possession. The sum so paid by the purchaser exceeded the price which he had paid for the car. *Held*, that the sum paid to the Customs authorities was the proper measure of the "loss directly "and naturally resulting" from the breach of the implied warranty for quiet possession and of the implied condition, treated as a warranty, that the seller had the right to sell the car, and that accordingly the whole of such sum was recoverable by the purchaser notwithstanding that it exceeded the purchase price. *Stock v. Urey* [Judge of Assize 71

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